Supreme Court, U.S.
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No. 10-124

In The

Supreme Court of the United States

MICHAEL TULLY,

Petitioner,

v.

RUSH COUNTY PROSECUTOR PAUL BARADA, in his individual capacity; and RUSH COUNTY JUVENILE PROBATION OFFICER CATHERINE CUSTER, in her individual capacity,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where a person who was not arrested but rather summoned to court on threat of contempt sanctions and arrest to face charges that he violated the law when he had not done so and the state had no evidence that he had done so:

1. Whether his submission to a summons under threat of arrest constitutes a seizure under the Fourth Amendment; and,

2. Whether the U.S. Constitution prohibits his prosecution without probable cause.

PARTIES TO THE PROCEEDINGS
(RULE 14.1(b) STATEMENT)

A list of all parties to the proceedings in the court whose judgment is the subject of the petition is as follows:

Plaintiff-Appellant and Petitioner: Michael Tully.

Defendants-Appellees and Respondents: Paul Barada, Rush County Prosecutor, in his individual capacity; Catherine Custer, Rush County Juvenile Probation Officer, in her individual capacity.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner Michael Tully respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the U.S. Court of Appeals for the Seventh Circuit, filed on March 17, 2010.

OPINIONS BELOW

The Court of Appeals for the Seventh Circuit's opinion holding that Petitioner may not assert a federal right under 42 U.S.C. § 1983 to be free from being summoned to court and prosecuted without probable cause, under either the Fourth or Fourteenth Amendments, entered March 17, 2010, is reported at *Tully v. Barada*, 599 F.3d 591 and reproduced at App. 1.

The memorandum order of the United States District Court for the Southern District of Indiana, entered August 7, 2009, granting Respondents' Motion to Dismiss, is reported at *Tully v. Barada*, 2009 U.S. Dist. LEXIS 69238, 2009 WL 2447807 and reproduced at App. 10.

JURISDICTION

On March 17, 2010, the U.S. Court of Appeals for the Seventh Circuit, exercising its jurisdiction pursuant to 28 U.S.C. § 1291 (appeal of a final decision of a

district court), issued an opinion affirming the district court's order. App. 1.

On April 22, 2010, the Seventh Circuit issued an order denying Petitioner's petition for rehearing and request for rehearing *en banc*. App. 26.

This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1254(1). This petition is timely under 28 U.S.C. § 2102(c) and Supreme Court Rules 13.1 and 13.3 because it is being filed within 90 days after the denial of a timely petition for rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Federal Constitutional Provisions

Fourth Amendment

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment (in relevant part)

No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. Federal Statute

42 U.S.C. § 1983 (in relevant part)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

C. State Statutes

Indiana Code 31-37-1-2

A child commits a delinquent act if, before becoming eighteen (18) years of age, the child commits an act that would be an offense if committed by an adult, except an act committed by a person over which the juvenile court lacks jurisdiction under IC 31-30-1.

Indiana Code 14-22-6-9

A person may not:

(1) hunt, shoot, shoot at, or kill an animal; or

(2) shoot at an object;

from within, into, upon, or across a public highway in Indiana.

Indiana Code 14-22-38-1

Except as otherwise provided in this article, a person who violates this article commits a Class C misdemeanor.

Indiana Code 34-13-3-8

A governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from the following: . . . (8) The adoption and enforcement of or failure to adopt or enforce a law (including rules and regulations), unless the act of enforcement constitutes false arrest or false imprisonment.

STATEMENT OF THE CASE

A. Facts Giving Rise To This Case

On the evening of December 23, 2006, in rural Rush County, Indiana, Petitioner Michael Tully, who was then seventeen years old, had been hunting with a friend. Following a report of shots having been

fired, the two of them were detained briefly and questioned, but not arrested or cited by a Rush County, Indiana, sheriff's deputy. Michael and his companion had a .22 caliber rifle, a spotlight, and a dead raccoon carcass in Michael's truck. App. 30, 60. Though he did not arrest the boys, the deputy did refer the incident to the Rush County Juvenile Probation Department for further investigation of an "alleged" crime of "shooting from Public Highway." App. 38.

Slightly over two months later, on February 27, 2007, Respondent Custer, a Rush County juvenile probation officer, without any personal knowledge of the events, wrote a "Preliminary Inquiry and Investigation" report, stating that Michael had violated an Indiana statute which prohibits shooting at an object "from within, into, upon, or across a public highway in Indiana." App. 39. *See also* Indiana Code 14-22-6-9. She referred the case to the prosecutor because Michael was unwilling to admit to having committed the offense. App. 62 (Complaint, ¶ 30); App. 42 ("Reasons for Recommendation" . . . "Child was not willing to admit to Shooting from a Public Highway."). The next day, February 28, 2007, Respondent Barada, the Rush County Prosecutor, also lacking personal knowledge of the events, filed a Verified Petition of Delinquency ("Petition") in the Rush County Juvenile Court, affirming under penalty for perjury that:

> On or about the 23rd day of December, 2006, Rush County, Indiana, MICHAEL TULLY did hunt, shoot, shoot at, or kill an animal; or shoot at an object; from within, into, upon,

> or across a public highway in Indiana, all of which is against the peace and dignity of the State of Indiana and contrary to the form of the statute in such case made and provided to-wit: I.C. 14-22-6-9 and would constitute a Class 'C' Misdemeanor if committed by an adult.

App. 36-37.

On March 6, 2007, Michael and his parents were summoned to court to respond to the state's filing of the delinquency petition. App. 44, 47 (Complaint, ¶ 38).[1] That summons "commanded [them] to appear before the Judge of the Court[,]" and stated: "[i]f you fail to appear as above commanded, you may be held in Contempt of Court, and a warrant may be issued by the court." App. 44, 47. Michael submitted to the summons and participated in a juvenile adjudication concerning his raccoon hunting as a result. App. 64 (Complaint, ¶¶ 39-41) (describing proceedings).

On April 26 and May 17, 2007, the Rush Circuit Court held fact finding hearings on the delinquency petition. App. 30. The Court found the allegations of

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[1] In Indiana, as in most other states, a juvenile's commission of an act which would be a crime if committed by an adult constitutes an act of juvenile delinquency. Ind. Code 31-37-1-2. For the delinquent act allegedly committed by Michael, he could have received not only probation but also been ordered incarcerated for up to four months in the state Department of Correction. Ind. Code 31-37-19-6(b)(2)(C).

the petition to be true, and adjudicated Michael a delinquent child. *Id.*

Michael appealed, and the Indiana Court of Appeals reversed, finding that there was only one testifying "witness" to the events underlying Michael's delinquency adjudication (the person who telephoned the police initially), and that this witness could not testify that it was Michael who fired the shots, and "never testified that he saw any shots being fired 'from within, into, upon, or across'" a road. App. 32. The appellate court rejected the state's argument that despite this lack of evidence, it could be "inferred" that Michael committed a delinquent act, an inference, the Court determined, which "stretches the concept of circumstantial evidence beyond its breaking point." *Id.* at 32. The Court of Appeals thus reversed, holding that "[t]here is insufficient evidence to support M.T.'s delinquency adjudication." App. 35.

B. The District Court Proceedings

On September 16, 2008, Michael brought suit against Respondents in the United States District Court for the Southern District of Indiana, alleging violations of the Fourth and Fourteenth Amendments to the United States Constitution arising from Michael being summoned to court and subjected to delinquency proceedings in the absence of probable cause. App. 64.

Respondents filed a motion to dismiss the complaint for failure to state a claim pursuant to Rule

12(b)(6) of the Federal Rules of Civil Procedure. On August 7, 2009, the district court granted the motion, holding that being summoned to court does not constitute a seizure under the Fourth Amendment (App. 19); that "Tully's purported interest in not being prosecuted groundlessly is not an interest that the Fourth Amendment protects" (*Id.* at 19); and, that "there is no constitutional right not to be prosecuted without probable cause." App. 17.

C. The Appellate Court Proceedings

On March 17, 2010, the Court of Appeals for the Seventh Circuit issued an opinion affirming the District Court's dismissal of the complaint for failure to state a claim upon which relief may be granted, holding that submitting to a summons does not constitute a seizure and that there is no constitutional right not to be prosecuted without probable cause. App. 7. Michael filed a timely petition for rehearing with a suggestion for rehearing *en banc*, which the Seventh Circuit denied on April 22, 2010. App. 26.

REASONS FOR GRANTING THE PETITION

Certiorari Should Be Granted to Establish the Rules That Submitting to a State Command to Appear under Penalties of Contempt and Arrest Constitutes a Fourth Amendment Seizure; and That the Fourth and Fourteenth Amendments Require State Prosecutions to Be Premised on Probable Cause

The framers of our Constitution sought to protect individuals from the ordeal of being seized and prosecuted absent probable cause to suspect them of having committed a crime. This protection distinguishes us from other countries where people can be arrested and prosecuted without any evidence of guilt. This Court has recognized the probable cause standard as the threshold for arrest and continued detention; it should use this case to articulate the same right with respect to prosecutions which occur without the initial step of formal arrests.

Despite this fundamental principle seemingly basic to our society, this Court has never directly articulated a minimum standard necessary for state prosecution to pass constitutional muster, and the circuit court case law on this point is in disarray. The Court should articulate a clear standard in this case, by holding that submission to a court summons constitutes a seizure and that probable cause is required before a proper prosecution can ensue. Seizures and prosecutions without probable cause violate both the Fourth Amendment's unreasonable seizure provision

and the procedural due process guarantee of the Fourteenth Amendment.

A. Michael Tully was Seized for Fourth Amendment Purposes When he Submitted to a Summons Under Threat of Sanctions and Arrest, and Was Then Subjected to a Prosecution without Probable Cause

Michael Tully was prosecuted for shooting from or across a roadway despite having not done so and there being no evidence that he did so. The police officer who responded to the complaint of shots fired had reason to believe that either Michael or his companion had shot and killed a raccoon. This act is lawful and common in rural Indiana. The police officer also knew that the boys had traveled in Michael's truck to and from where they hunted, which is also legal. Tellingly, the officer did not make an arrest that night.

More than a month after the incident, Michael and his parents were summoned to the county probation department and threatened with court sanctions if they failed to appear. App. 61 (Complaint, ¶ 26). They appeared, and were told that charges were going to be filed against Michael. *Id.* (Complaint, ¶ 27). A month later, and despite having no evidence that Michael committed a crime, Respondent Juvenile Probation Officer Custer accused Michael of committing the delinquent act of shooting from or across a road, and referred the case to the

prosecutor because Michael asserted his innocence. App. 62 (Complaint, ¶ 30); App. 42 ("Reasons for Recommendation" . . . "Child was not willing to admit to Shooting from a Public Highway."). Respondent Prosecutor Barada then swore under oath a probable cause affidavit charging Michael with having shot from or across a road, causing the summons to be issued. In so doing, Respondents Custer and Barada subjected Michael to prosecution even though there was no probable cause that a criminal act had been committed. The ensuing prosecution brought about a host of adverse consequences and restrictions on his liberty.

As set forth in Respondent Custer's prefiling investigation, Michael was seventeen years old at the time and had never before been arrested for or charged with a crime. App. 40. He resided at home in rural Rush County with his parents, a farmer and a nurse; he "does what is asked of him at home;" he had no "school problems," where he made "As and Bs;" and, he was involved in extracurricular activities, such as "SADD [Students Against Drunk Driving], FFA [Future Farmers of America], and Varsity Scholars." App. 40-42. Michael detassled corn in the summers for employment, and "enjoyed hunting in his spare time." *Id.*

Other than Michael and his friend, there was only one "witness" to the shooting, a person who heard the shots but did not actually see anything. The shooting occurred at night when it was dark, and that person was unable to testify: 1) where the two

shots he heard were fired from; and, 2) who had fired them. The state presented no evidence that either of the two shots at issue were fired by Michael or from or across a road. App. 32-33.

In fact, it was not Michael, but his friend, who had exited the vehicle and shot at the raccoon from a ditch where the raccoon was. App. 58 (Complaint, ¶¶ 9, 10). This shooting was lawfully done pursuant to the statute.

Despite the lack of any evidence that Michael had fired any shots or where the shots were fired from or to, the juvenile court judge concluded Michael was guilty of having shot from or across a roadway. Michael was fined, and the court placed conditions on his movements, forbade him from possessing firearms, placed him on probation, subjected him to random drug testing, and required him to "waive [his] right against unreasonable searches," subjecting his "person and property" to search "at any time." App. 53 (conditions of probation, ¶ 15).

After obtaining Michael's conviction, Prosecutor Barada dismissed the charges against his hunting companion (who actually fired the shots) for lack of "trial quality evidence," even though those charges were based on the same evidence used to convict Michael. App. 64 (Complaint ¶¶ 43-44).

Although he had obeyed the law, Michael was falsely accused of having committed a criminal or delinquent act, summoned to court under threat of contempt and arrest, forced to hire a lawyer to defend

himself, and subjected to criminal-like proceedings; additionally, he suffered emotional distress, mental anguish, embarrassment, humiliation and loss of liberty. App. 58 (Complaint at 9); App. 44 (Summons).[2]

B. Michael's Submission to the Summons Constituted a Fourth Amendment Seizure

Michael was not arrested at the scene by the responding deputy; rather it was the prosecutor who later filed charges causing him to be summoned under threat of arrest. Michael submitted to this show of authority and hence was seized for Fourth Amendment purposes. *Albright v. Oliver*, 510 U.S. 266, 268, 271, (1994) (Rehnquist, C.J.) (plurality opinion) ("When he learned of the outstanding [arrest] warrant, petitioner surrendered to respondent, Roger Oliver, a police detective. . . . He was released after posting bond, one of the conditions of which was that he not leave the State without permission of the court."); *id.* at 271 ("his surrender to the State's show of authority constituted a seizure for purposes of the Fourth Amendment.") (citing *Terry v. Ohio*, 392 U.S. 1, 19

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[2] Because the district court decided this matter in the context of a motion to dismiss, the facts pled in the complaint, along with reasonable inferences, should be taken as true. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' [*Bell Atlantic Corp. v.*] *Twombly*, 550 U.S. 544, 570 (2007)").

(1968); *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989)).

This Court recognized in *Gernstein v. Pugh*, 420 U.S. 103 (1975), that even pretrial release "may be accompanied by burdensome conditions that effect a significant restraint of liberty." *Id.* at 114. As Justice Ginsburg observed in *Albright*:

> This view of the definition and duration of a seizure comports with common sense and common understanding. A person facing serious criminal charges is hardly freed from the state's control upon his release from a police officer's physical grip. He is required to appear in court at the state's command. He is often subject, as in this case, to the condition that he seek formal permission from the court (at significant expense) before exercising what would otherwise be his unquestioned right to travel outside the jurisdiction. Pending prosecution, his employment prospects may be diminished severely, he may suffer reputational harm, and he will experience the financial and emotional strain of preparing a defense.
>
> A defendant incarcerated until trial no doubt suffers greater burdens. That difference, however, should not lead to the conclusion that a defendant released pretrial is not still "seized" in the constitutionally relevant sense. Such a defendant is scarcely at liberty; he remains apprehended, arrested in his movements, indeed "seized" for trial, so long as he is bound to appear in court and

> answer the state's charges. He is equally bound to appear, and is hence "seized" for trial, when the state employs the less strong-arm means of a summons in lieu of arrest to secure his presence in court.

Albright, 510 U.S. at 278-79 (Ginsburg, J., concurring).

Despite *Albright's* teaching that submitting to a show of state authority constitutes a Fourth Amendment seizure, the Seventh Circuit determined "that Tully was not seized within the meaning of the Fourth Amendment merely by being summoned to appear in court[.]" App. 8-9.

While some Circuits follow *Albright* on this issue, a number of them, like the Seventh Circuit, continue to rule that submitting to a court summons does not constitute a Fourth Amendment seizure. *Compare, e.g.*, *Evans v. Ball*, 168 F.3d 856 (5th Cir. 1999) (combination of summons, processing and bail conditions amounted to a seizure); *Gallo v. City of Phila.*, 161 F.3d 217 (3d Cir. 1998) (as amended) (Dec. 7, 1998) (pretrial release conditions amounted to a seizure); *Murphy v. Lynn*, 118 F.3d 938 (2nd Cir. 1997) (order that arrestee not leave state and that he make court appearances constituted a seizure) (but, *see*, *Burg v. Gosselin*, 591 F.3d 95, 98 (2d Cir. 2010)) ("We hold that the issuance of a pre-arraignment, non-felony summons requiring a later court appearance, without further restrictions, does not constitute a Fourth Amendment seizure."); *Bielanski v. County of Kane*, 550 F.3d 632, 642 (7th Cir. 2008) (collecting

cases) (rejecting "continuing seizure" theory where person summoned to court, could not leave state without court permission, and required to submit to interview with probation officer); *Becker v. Kroll*, 494 F.3d 904 (10th Cir. 2007) (person summoned on Medicaid fraud charge but not arrested nor incarcerated not subject to seizure); *DiBella v. Borough of Beachwood*, 407 F.3d 599 (3rd Cir. 2005) (distinguishing *Gallo*) (person subject to court appearances on trespass charge not seized); *Kingsland v. City of Miami*, 382 F.3d 1220, 1236 (11th Cir. 2004) (no continuing seizure arises from bond and requirement to appear at criminal proceedings); *Karam v. City of Burbank*, 352 F.3d 1188 (9th Cir. 2003) (requirements that person appear in court and not travel interstate does not amount to seizure); *Nieves v. McSweeney*, 241 F.3d 46 (1st Cir. 2001) (collecting cases) (requirement to appear in court does not amount to seizure).

A reasonable person receiving a summons from the government "commanding" them to appear at a certain time and place or else face sanctions and arrest would not feel at liberty to ignore the command. Justices Rehnquist and Ginsburg's opinion that submitting to such a show of state authority amounts to a seizure under the Fourth Amendment comports with common sense and this Court's jurisprudence. *Albright*, 510 U.S. at 271; *Terry*, 392 U.S. at 19, n.16 (A "seizure" triggering the Fourth Amendment's protections occurs when government actors have, "by means of physical force or show of authority, . . . in some way restrained the liberty of a

citizen,"); *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) (a seizure occurs when a reasonable person would believe that he or she is not "free to leave."); *Fla. v. Bostick*, 501 U.S. 429, 436-437 (1991) ("the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."); *Brower v. County of Inyo*, 489 U.S. at 599 ("We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result.").

A summons to appear to answer to an accusation of criminal or delinquency charges accompanied by the threat of arrest represents a significant exercise of the state's coercive power. When an individual submits to such a show of authority, he is obeying the command of the state over his person, is not "free to leave," in any relevant sense, and is thus seized for purposes of the Fourth Amendment.

Certiorari should be granted to confirm *Albright*'s teaching in this regard, and resolve the Circuit split on whether submitting to a show of state authority of a summons under threat of sanctions and arrest constitutes a seizure under the Fourth Amendment.

C. Probable Cause is Required for Prosecution Under the Fourth Amendment

The Court of Appeals' conclusion that there is no constitutional right not to be prosecuted without probable cause contravenes the tenet that ours is a

society of limited government with imposed restrictions on the use of its most coercive powers.

This Court has recognized that:

> Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life.

Young v. United States ex rel. Vuitton Et Fils S. A., 481 U.S. 787, 814 (1987).

In 1940, then-Attorney General Robert Jackson described the "most dangerous power of the prosecutor" as "the power to pick people that he thinks he should get, rather than pick cases that need to be prosecuted. . . ." Robert H. Jackson, U.S. Att'y Gen., The Federal Prosecutor, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940), in 24 J. Am. Judicature Soc'y 18, 19 (1940); *see Morrison v. Olson*, 487 U.S. 654, 727-29 (1988) (Scalia, J., dissenting) (quoting Jackson's speech to illustrate that "[o]nly someone who has worked in the field of law enforcement can fully appreciate the vast power and the immense discretion that are placed in the hands of a prosecutor with respect to the objects of his investigation."). As Justice Stevens, who himself had served as a special prosecutor earlier in his

career, observed in dissent in *Albright*: "I can think of few powers that the State possesses which, if arbitrarily imposed, can harm liberty as substantially as the filing of criminal charges." *Albright,* 510 U.S. at 312 (Stevens, J., dissenting).

The probable cause standard for prosecution provides a safeguard against prosecutorial abuse and safeguards our basic liberty.

Long ago, Chief Justice Shaw of the Massachusetts Supreme Court described the right not to be prosecuted unless probable cause exists as one of the most basic in our land:

> The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a grand jury, in case of high offences, is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty.

Jones v. Robbins, 74 Mass. 329, 344 (1857).

The Fifth Amendment limits the federal government's power to prosecute persons for serious crimes. Under that Amendment, no such prosecution may issue except on a grand jury determination that there

is probable cause to support the accusation.[3] *United States v. Calandra*, 414 U.S. 338, 343 (1974) (grand jury's historic functions include "the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions."). In *Hurtado v. California*, 110 U.S. 516 (1884), this Court concluded that the grand jury requirement of the Fifth Amendment did not apply to the states, in part because the state's [California's] requirement of a judicial determination "to the probable guilt of the defendant." *Id.* at 538.

In *Gernstein* this Court recognized the probable cause standard contained in the Fourth Amendment was applicable to the states both for arrest and for continued detention:

> Both the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common-law antecedents. See *Cupp v. Murphy*, 412 U.S. 291, 294-295 (1973); *Ex parte Bollman*, 4 Cranch 75 (1807); *Ex parte Burford*, 3 Cranch 448 (1806). The standard for arrest is probable cause, defined in terms of facts and circumstances "sufficient to warrant a prudent man in believing that the [suspect] had

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[3] "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger. . . ." U.S. Const., Amdt. 5.

> committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964). See also *Henry v. United States*, 361 U.S. 98 (1959); *Brinegar v. United States*, 338 U.S. 160, 175-176 (1949). This standard, like those for searches and seizures, represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime.
>
> These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime.

Gernstein, 420 U.S. at 111-112.[4]

At least as stringent a standard should apply beyond arrest and continued detention to the charging decision itself, where state officials have the opportunity to consider the evidence, or lack thereof, more fully. To require less would not only be inconsistent with the arrest and continued detention standard, but would "leave law-abiding citizens at the mercy of the [prosecutor's] whim or caprice." *Gernstein*, 420 U.S. at 112. It would make no sense to hold a prosecutor, who has the training and time to

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[4] In dicta relegated to a footnote, the Gerstein Court suggested that probable cause was not required for an indictment unaccompanied by an arrest. *Id.*, 420 U.S. at 125, n.26. The plurality decisions in *Albright* ignored this dicta when rejecting such claims as arising under the substantive guarantees of the Fourteenth amendment and suggesting that the Fourth Amendment was the proper, albeit unraised, source of any such right.

consider and evaluate the evidence before making the charging decision, to a lesser standard than required of a police officer in the field, who often has to make an instantaneous decision whether probable cause exists to arrest. The Seventh Circuit would not impose *any* standard on prosecutions, a rule contrary to western jurisprudence and one which threatens our most basic freedoms.

D. The Lower Federal Courts' Jurisprudence on Whether a Prosecution Without Probable Cause Violates the Constitution is in Disarray

The issue of whether there is a constitutional right not to be prosecuted without probable cause is important and needs to be answered directly because it controls whether a person so prosecuted and vindicated can subsequently bring a 42 U.S.C. §1983 civil rights action seeking damages for such a prosecution. This Court should grant certiorari to clarify the law in this area, and hold that probable cause is required for state prosecutions, that such claims arising from its absence should be analyzed under the Fourth and Fourteenth Amendments, and that the objective reasonableness standard applicable to claims under the Fourth Amendment applies to such claims, rather than the subjective element of maliciousness utilized in state tort law.

Many lawsuits seeking compensation for prosecutions initiated without probable cause have been

labeled "malicious prosecution," by litigants and courts, borrowing from the common law tort of malicious prosecution.[5]

In *Albright* a plurality of this Court opined that the substantive guarantees of the Fourteenth Amendment's due process clause do not encompass the right not to be prosecuted without probable cause, and, that if such a right exists, it most likely emanates from the Fourth Amendment's unreasonable seizure proscription. *Albright*, 510 U.S. at 266 (Rehnquist, O'Conner, Scalia, and Ginsburg).

As the *Albright* plurality recognized: "the extent to which a claim of malicious prosecution is actionable under §1983 is one 'on which there is an embarrassing diversity of judicial opinion.'" 501 U.S. at 270 (citations omitted, collecting cases).

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[5] The common law tort of malicious prosecution contains the following elements:

a. There must be a criminal action initiated by the defendant;

b. The action must have been terminated in the plaintiff's favor;

c. Probable cause to prosecute must have been absent; and,

d. The defendant must have acted with malice towards the plaintiff.

See generally W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 119, pp. 876-882 (5th ed. 1984).

In *Wallace v. Kato*, 594 U.S. 384, 390, n.2 (2007), the Court, citing *Albright's* plurality opinions, explained that it has "never explored the contours of a Fourth Amendment malicious-prosecution suit under Section 1983;" recognized a "range of approaches" on such claims in the lower courts; and, did not foreclose such claims, but rather "assumed, without deciding," that such claims were cognizable under §1983. *Id.* at 390, n.2. *See also Albright*, 510 U.S. at 271 ("Most of the lower courts recognize some form of malicious prosecution action under § 1983.").

Though the Court's plurality decision in *Albright* concluded that any such claim would come under the Fourth Amendment rather than the substantive due process clause of the Fourteenth Amendment, it did not set forth the elements of such a claim, and provided little direction to lower courts. Subsequently, a number of courts have commented on *Albright's* lack of guidance and the resulting disarray in the law: *Albright*: "spawned controversy and confusion in the lower courts," *Kerr v. Lyford*, 171 F.3d 330, 342 (5th Cir. 1999) (Jones, J., concurring); "created great uncertainty in the law," *Gallo v. City of Phila.*, 161 F.3d 217, 222 (3d Cir. 1998); engendered "considerable confusion," *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1070 n.4 (9th Cir. 2004); and, "muddied the waters rather than clarified them." *Taylor v. Meacham*, 82 F.3d 1556, 1561 n.5 (10th Cir. 1996).

The Circuits have generally split on whether and to what extent the common law elements of the tort of

malicious prosecution are relevant to § 1983 claims under the Fourth or Fourteenth Amendments.

The First, Second, and Eleventh Circuits require plaintiffs pleading malicious prosecution claims under § 1983 to also satisfy the common law elements of the claim in addition to proving a constitutional violation. *See Shaarbay v. Palm Beach County Jail*, 350 Fed. Appx. 359, 362 (11th Cir. 2009) ("In order to prove malicious prosecution under § 1983, a plaintiff must establish '(1) the elements of the common law tort of malicious prosecution, and (2) a violation of [his] Fourth Amendment right to be free from unreasonable seizures.'" (quoting *Kingsland v. City of Miami*, 382 F.3d 1220, 1234 (11th Cir. 2004)); *Jones v. City of Boston*, 135 Fed. Appx. 439, 439-440 (1st Cir. 2005) (affirming district court's dismissal of complaint for failure to state federal or state malicious prosecution claim due to absence of facts supporting common law element that related criminal prosecution had terminated in plaintiff's favor) (citing *Nieves v. McSweeney*, 241 F.3d 46, 53 (1st Cir. 2001) (describing elements of the common-law malicious prosecution cause of action in Massachusetts)); *Kinzer v. Jackson*, 316 F.3d 139, 143 (2d Cir. 2003) ("To sustain a § 1983 claim of malicious prosecution, a plaintiff must demonstrate conduct by the defendant that is tortious under state law and that results in a constitutionally cognizable deprivation of liberty. *Singer v. Fulton County Sheriff*, 63 F.3d 110, 116-17 (2d Cir. 1995)").

The Fourth, Fifth, Seventh, and Tenth Circuits instead concentrate on whether a constitutional violation exists. *See Pierce v. Gilchrist*, 359 F.3d 1279, 1290 (10th Cir. 2004) ("We . . . reject[ ] the view that a plaintiff does not state a claim actionable under § 1983 unless he satisfies the requirements of an analogous common law tort."); *Castellano v. Fragozo*, 352 F.3d 939, 953-54 (5th Cir. 2003) (*en banc*), *cert. denied*, 543 U.S. 808 (2004) (reviewing Circuit split) ("The initiation of criminal charges without probable cause may set in force events that run afoul of explicit constitutional protection. . . . [S]ome such claims may be made under 42 U.S.C. § 1983. Regardless, they are not claims for malicious prosecution and labeling them as such only invites confusion."); *Newsome v. McCabe*, 256 F.3d 747, 753 (7th Cir. 2001) ("[M]alicious prosecution is not tenable as an independent constitutional theory. . . ."); *Lambert v. Williams*, 223 F.3d 257, 262 (4th Cir. 2000) ("[T]here is no such thing as a '§ 1983 malicious prosecution' claim. . . . [It] is simply a claim founded on a Fourth Amendment seizure that incorporates elements of the analogous common law tort of malicious prosecution. . . . It is not an independent cause of action." (citation omitted)).

Judge Higginbotham's opinion for the *en banc* Fifth Circuit in *Castellano* is particularly insightful, for it not only surveys the legal landscape on this issue, but also forcefully concludes that the Fourth Amendment's objective reasonableness test should control rather than a grafting of the subjective element of malice from the common law tort of

malicious prosecution. *Castellano*, 352 F.3d at 942-961.

As this Court taught in *Graham v. Connor*, 490 U.S. 386 (1989), the specific constitutional provision under which a §1983 claim is brought should be identified, and, that provision's parameters controlling. *Id.* at 395 ("Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of . . . governmental conduct," . . . , "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.").

Although the Court may look to the common law "when [thinking] about elements of actions for constitutional violations . . . the common law is best understood here more as a source of inspired examples than of prefabricated components of [constitutional] torts." *Hartman v. Moore*, 547 U.S. 250, 258 (2006) (citation omitted).

The line of cases requiring the subjective *mens rea* element of a state tort of malicious prosecution claim in order to prove a Fourth Amendment violation conflict with the objective reasonableness standard of the Fourth Amendment.

In other contexts, this Court has "rejected reasoning that 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States,'" *Daniels v. Williams*, 474 U.S. 327, 332 (U.S. 1986) (quoting *Paul v. Davis*, 424 U.S. 693, 701

(1976). The same reasoning should serve to reject the *mens rea* element of a malicious prosecution claim for a constitutional violation of a prosecution without probable cause.

Under the Fourth Amendment, the test of whether a state actor's actions are reasonable is an objective one; the actor's own motivations are not legally relevant. *L.A. County v. Rettele*, 550 U.S. 609, 614 (2007) ("The test of reasonableness under the Fourth Amendment is an objective one.") (citing *Graham,* 490 U.S. at 397); *Whren v. United States,* 517 U.S. 806, 813 (1996) ("[W]e have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers"); *Graham*, 490 U.S. at 397 (subjective motivations of individual officers have no bearing on whether a particular seizure is unreasonable under the Fourth Amendment).

This Court should grant certiorari to clarify the law in this area, and hold that probable cause is required for state prosecutions, that such claims arising from its absence should be analyzed under the Fourth Amendment, and that the objective reasonableness standard applicable to claims under that Amendment applies, rather than the subjective element of maliciousness.

The question of whether there is a right not to be prosecuted without probable cause is an important one which affects both the distributive and normative quality of justice in our society. The present unsettled

state of the law permits litigants in some states to be compensated for the real harm created by baseless prosecutions, while denying any remedy to other persons who happen to live in states whose circuit courts refuse to recognize such a right. *Compare e.g.*, *Webb v. Sloan*, 330 F.3d 1158, 1163 (9th Cir. 2003) (affirming jury verdict of $80,000 on behalf of African American arrested and prosecuted without probable cause, where prosecutors continued to prosecute plaintiff despite police officers recanting accusations and where prosecutor refused to dismiss criminal charges unless plaintiff agreed to civil waiver of liability) (noting that in response to special interrogatories, "the jury found that Defendant Carson City had a custom, policy, or practice that violated Plaintiff's federal constitutional right not to be prosecuted without probable cause."); *Freeman v. Guy*, 303 Fed. Appx. 358, 362-363 (7th Cir. 2008) (affirming dismissal of § 1983 action brought by plaintiff who "claimed that he had been arrested and charged without probable cause on 13 occasions due to the prosecutor's animosity toward the arrestee.") ("[T]here is no constitutional right not to be prosecuted without probable cause," and a plaintiff cannot "state a section 1983 claim simply by showing that he was wrongly prosecuted.") (citation omitted); *Vercel v. Ligon-Hanes*, 2010 U.S. Dist. LEXIS 32439, *7 (N.D. Ind. Mar. 31, 2010) ("Plaintiff alleges that this arrest was retaliatory for his political views and was a result of racial discrimination. Plaintiff alleges that he was arrested because he publicly opposed the mayor's re-election and because the mayor's administration

'eliminated white people out of the administration and their positions in the city.'") (dismissing case in part because "[t]he Court of Appeals for the Seventh Circuit has clarified this issue even further, stating that 'there is no constitutional right not to be prosecuted without probable cause' and a plaintiff cannot 'state a section 1983 claim simply by showing that he was wrongly prosecuted.'").

This Court had an opportunity to clarify this area of the law recently when it granted certiorari in *Pottawattamie County v. McGhee*, 129 S. Ct. 2002 (2009). However, the case settled after oral argument and certiorari was dismissed. 130 S. Ct. 1047 (2010). Although the types of prosecutorial conduct at issue in *Pottawattamie* and this case were different, both cases represent the genre of cases sometimes referred to as "malicious prosecution." This case presents the Court with the opportunity lost in *Pottawattamie* to articulate the constitutional standards for these types of cases and provide guidance to the lower federal courts.

E. Prosecutions without Probable Cause Also Violate Fourteenth Amendment Procedural Due Process Guarantees

The prosecutor's actions in this case violated not only the Fourth Amendment, but also the procedural due process interests protected by the Fourteenth Amendment.

In *Albright* this Court rejected the contention that a prosecution without probable cause violated substantive due process, and suggested that the Fourth Amendment was the Constitutional mooring for such claims. Even so, the Court did not foreclose litigants from proceeding under a procedural due process theory. Indeed, at least four Justices appeared to conclude that such a right would exist under certain circumstances.

Justice Kennedy, writing for himself and Justice Thomas, concurred in the plurality's conclusion that probable cause-lacking prosecutions do not offend substantive due process, but specifically left open the possibility that such prosecutions violate *procedural* due process, at least where a state does not provide an adequate post-deprivation tort remedy for malicious prosecution:

> The common law of torts long recognized that a malicious prosecution, like a defamatory statement, can cause unjustified torment and anguish – both by tarnishing one's name and by costing the accused money in legal fees and the like. We have held, of course, that the Due Process Clause protects interests other than the interest in freedom from physical restraint, . . . and for purposes of this case, we can assume, arguendo, that some of the interests granted historical protection by the common law of torts (such as interests in freedom from defamation and malicious prosecution) are protected by the Due Process Clause.

Albright, 510 U.S. at 283-84 (internal citations omitted).

Justice Kennedy did not answer the question definitively, but his opinion strongly suggests that such protection exists. *Id.* at 286 ("if a State did not provide a tort remedy for malicious prosecution, there would be force to the argument that the malicious initiation of a baseless criminal prosecution infringes an interest protected by the Due Process Clause and enforceable under § 1983.").

Justices Stevens and Blackmun in dissent opined that baseless prosecutions would violate procedural due process rights. *Id.* at 300. ("[C]ommencement of a criminal case deprives the accused of liberty, [and] the state has a duty to make a probable-cause determination before filing charges.").

With respect to procedural due process and Justice Kennedy's criterion of whether the state provides an adequate post-deprivation process, Indiana does not permit claims for malicious prosecution against police officers or prosecutors. *Foster v. Pearcy,* 387 N.E.2d 446, 449 (Ind. 1979) (holding "where . . . acts are reasonably within the general scope of authority granted to prosecuting attorneys, no liability will attach" and affirming prior case law that prosecutors are absolutely immune from suits for malicious prosecution); *Livingston v. Consolidated City of Indianapolis*, 398 N.E.2d 1302, 1306 (Ind. Ct. App. 1979) ("We hold, therefore, that in accordance with the plain wording of Ind. Code 34-4-16.5-3,

Subsection 5 [now 34-13-3-3(8)], immunity is granted to the State and municipal subdivisions and police officers in actions for malicious prosecution.").

Indiana's lack of a remedy for malicious prosecution against governmental actors can hardly be considered "adequate" for Fourteenth Amendment procedural due process purposes.

This is not to say that Petitioner agrees that the availability of a state remedy for malicious prosecution would negate a Fourteenth Amendment procedural due process right. This Court's due process jurisprudence on this point is underpinned by the rationale that some state deprivations are random and unauthorized, and hence pre-deprivation hearings are by definition unavailable and adequate post-deprivation remedies are all the process that is required. *See Parratt v. Taylor,* 451 U.S. 527, 543-44 (1981) (prisoner claimed negligence of correction official deprived him of property "without due process of law.") (a pre-deprivation remedy was infeasible and the State's post-deprivation remedy was considered adequate to prevent a constitutional violation) *reversed on negligence component, Daniels*, 474 U.S. at 332; *Hudson v. Palmer*, 468 U.S. 517, 533 (1984), (prisoner alleged that a prison guard intentionally destroyed his property) (due process clause not violated by random and unauthorized intentional deprivations of property "until and unless it provides or refuses to provide a suitable post deprivation remedy").

Here, the procedural deprivation was authorized by the only state official who could initiate the deprivation, and a pre-deprivation remedy, *i.e.*, a hearing on whether probable cause exists, is not only feasible, but is standard practice and constitutionally required for warrantless arrests and continued detentions. *Gernstein,* 420 U.S. at 111-112. This Court should clearly articulate that such a probable cause hearing is required for all state-initiated prosecutions. Requiring such a probable cause determination would be consistent with this Court's immunity doctrine, which provides that prosecutors do not enjoy absolute immunity until they have probable cause for arrest. *Buckley v. Fitzsimmons*, 509 U.S. 259, 274 (1993).[6]

F. A Separate Basis to Vacate the Judgment Below Arises From the Prosecutor Having Sworn to Untrue Facts in the Probable Cause Affidavit

A separate basis to vacate the judgment of the Court of Appeals is that it conflicts with this Court's holding in *Kalina v. Fletcher*, 522 U.S. 118 (1997).

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[6] Prosecutors generally enjoy absolute immunity for actions taken in their prosecutorial function, an immunity waived by Respondent Barada in this case. App. 7 (*Tully v. Barada*, 599 F.3d at 594) (summarizing: "Tully has managed to overcome the affirmative defenses of absolute immunity, the existence of probable cause, and *res judicata*, because the defendants waived them all.").

In *Kalina* this Court considered the issue of prosecutors who swear to untrue facts in a probable cause affidavit for arrest, and held that prosecutors can be liable for such acts, as they enjoy qualified rather than absolute immunity when swearing to such evidence.

The prosecutor in this case swore that Michael Tully shot from or across a roadway despite having no personal knowledge or evidence that he did so. When prosecutors sign such probable cause affidavits, they are acting as witnesses rather than advocates, and, under this Court's functional approach to absolute immunity, lose their absolute immunity to suit. *Kalina*, 522 U.S. at 130-31 ("Testifying about facts is the function of the witness, not of the lawyer. No matter how brief or succinct it may be, the evidentiary component of an application for an arrest warrant is a distinct and essential predicate for a finding of probable cause. Even when the person who makes the constitutionally required 'Oath or affirmation' is a lawyer, the only function that she performs in giving sworn testimony is that of a witness.").

Under such circumstances, prosecutors are acting not in an advocacy function but rather as complaining witnesses, and lose absolute prosecutorial immunity. *Kalina*, 522 U.S. at 131 ("§ 1983 may provide a remedy for respondent insofar as petitioner performed the function of a complaining witness.").

Thus, because he was acting as a witness rather than a lawyer when he signed the probable cause

affidavit under oath attesting to facts which were untrue and about which he had no personal knowledge, Prosecutor Barada can thus be held liable under § 1983 for a violation of Michael Tully's Fourth and Fourteenth Amendment rights to be free from prosecution without probable cause.

CONCLUSION

For the foregoing reasons, Petitioner Michael Tully requests that the Court grant certiorari, vacate the judgment of the Court of Appeals, and rule that a person submitting to the show of state authority represented by a court summons under threat of arrest, and being bound over for prosecution, is seized for purposes of the Fourth Amendment, and, that the U.S. Constitution prohibits prosecutions without probable cause under the Fourth Amendment and the procedural due process protections of the Fourteenth Amendment.

Respectfully submitted,

Dated: July 21, 2010

RICHARD A. WAPLES
Attorney for Petitioner
Counsel of Record

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In the
United States Court of Appeals
For the Seventh Circuit

No. 09-3237

MICHAEL TULLY,

Plaintiff-Appellant,

v.

RUSH COUNTY PROSECUTOR
PAUL BARADA, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:08-cv-01243-LJM-DML –
Larry J. McKinney, *Judge.*

ARGUED JANUARY 19, 2010 –
DECIDED MARCH 17, 2010

Before BAUER and WOOD, *Circuit Judges,* and KENNELLY, *District Judge.**

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* The Honorable Matthew F. Kennelly, United States District Court of the Northern District of Illinois, sitting by designation.

BAUER, *Circuit Judge.* Michael Tully sued Paul Barada and Catherine Custer under 42 U.S.C. § 1983, asserting that they violated his rights under the Fourth and Fourteenth Amendments by summoning him into court and initiating juvenile proceedings against him without probable cause. The district court dismissed Tully's case for failure to state a claim upon which relief can be granted. We affirm.

I. BACKGROUND

Wayne Elwell was in his home, located about a football field's length from a county-road bridge in Rush County, Indiana, when he observed that near the bridge were the headlights of a vehicle and a separate spotlight. He heard a gunshot coming from that direction, so he called the Sheriff's Department. He heard a second shot, saw someone go into the ditch, and called the sheriff again.

Deputy Sheriff Randy Chandler chased down a vehicle that had passed him on the way to the bridge. In the vehicle were Michael Tully, his friend Brock Carfield, a spotlight, a .22-caliber rifle, and a dead raccoon. Chandler asked the boys whether they knew it was wrong to shoot from a roadway, and they responded yes.

Tully and Carfield were charged in the Rush County Juvenile Court for shooting on or across a public highway in violation of Indiana Code § 14-22-6-9, with a charging document prepared by prosecutor Paul Barada based on a report completed by

probation officer Catherine Custer. The trial court found that the allegations against Tully were true, and adjudicated him to be a delinquent child. Indiana's appellate court reversed, finding insufficient evidence to support Tully's delinquency adjudication. *M.P.T. v. State*, 878 N.E.2d 542, 2007 WL 4555513, at *3 (Ind. App. Dec. 28, 2007).

Then Tully complained in the district court that Barada and Custer were liable under 42 U.S.C. § 1983 for violating his constitutional rights under the Fourth Amendment and the Fourteenth Amendment's Procedural Due Process Clause not to be summoned into court and prosecuted without probable cause. Barada and Custer each moved to dismiss. The district court granted the motions, finding that a court summons is not a "seizure" under the Fourth Amendment, and that there is "no constitutional right not to be prosecuted without probable cause." *Tully v. Barada*, 2009 WL 2447807, at *4 (S.D. Ind. Aug. 7, 2009) (quoting *Penn v. Harris*, 296 F.3d 573, 576 (7th Cir. 2002)).

II. DISCUSSION

We review de novo the district court's dismissal for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6); *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008). Tully states a claim only if he alleges enough facts to render the claim not just conceivable, but facially plausible. *Ashcroft v. Iqbal*, 129 S.Ct. 1937,

1949 (2009); *Bell Atl. v. Twombly*, 550 U.S. 544, 570 (2007).

The Supreme Court has neither recognized nor foreclosed the possibility of plausibly asserting a right not to be prosecuted without probable cause under § 1983, either under the Fourth Amendment, *Wallace v. Kato*, 549 U.S. 384, 390 n.2 (2007) ("We have never explored the contours of a Fourth Amendment malicious-prosecution suit under § 1983."), or the Fourteenth Amendment's Procedural Due Process Clause. *See Albright v. Oliver*, 510 U.S. 266, 316 (1996) (Stevens, J., dissenting) (finding that "in the aggregate, [the *Albright* Court's fractured] opinions do not reject [the notion that] the Due Process Clause of the Fourteenth Amendment constrains the power of state governments to accuse a citizen of an infamous crime.").

So the Courts of Appeals have taken "a range of approaches" on § 1983 malicious prosecution claims. *See Kato*, 549 U.S. at 390 n.2 (citing Martin A. Schwartz, 1 *Section 1983 Litigation* § 3.18[C], pp. 3-605 to 3-629 (4th ed. 2004)). Indeed, one reason the case law on this issue remains uncrystallized among the Courts of Appeals is that we infrequently need to decide whether plaintiffs can assert a right not to be prosecuted without probable cause under § 1983, because prosecutors (and probation officers engaging in prosecutorial functions) usually render the question moot by taking the simpler avenue of claiming absolute immunity. *See, e.g., Kalina v. Fletcher*, 522 U.S. 118, 130 (1997) (finding absolute immunity

affordable to a prosecutor's "determination that the evidence was sufficiently strong to justify a probable-cause finding, her decision to file charges, and her presentation of the information and the motion to the court"); *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) ("[I]n initiating a prosecution, . . . the prosecutor is immune from a civil suit for damages under § 1983."); *Smith v. Power*, 346 F.3d 740, 742 (7th Cir. 2003) ("[A]bsolute immunity shields prosecutors even if they act . . . without probable cause.") (internal quotation omitted); *Copus v. City of Edgerton*, 151 F.3d 646, 649-50 (7th Cir. 1998) (finding that a probation officer enjoys absolute immunity for engaging in prosecutorial functions).

But the defendants waived their absolute-immunity defense by failing to raise it in the district court. *See Scruggs v. Moellering*, 870 F.2d 376, 378 (7th Cir. 1989), *rev'd on other grounds*, *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429 (1993).

They also waived the argument that, because Tully's complaint showed probable cause on its face, it could not plausibly assert prosecution without probable cause. (The complaint recited the report of a gunshot, the sheriff finding Tully and his companion in the area, that they had the gun and the dead racoon, [sic] and that they responded yes when the sheriff asked whether they knew it was illegal to shoot from the road. *Cf. United States v. Arvizu*, 534 U.S. 266, 274 (2002) (describing probable cause as less likely than by a preponderance of the evidence)). Custer made this argument in the district court,

Custer's Answer to Compl. at 6, ¶ 9 ("As to claims for malicious prosecution, they are barred by . . . the existence of probable cause."), but not on appeal, and Barada raised it on appeal, Appellee Barada's Br. at 5 ("[T]he facts he did allege shows there was probable cause for the delinquency charges."), but not in the district court. Only if a party raises an argument both here and in the district court may we use it as an alternate means to affirm the district court's granting of a motion to dismiss. *See, e.g., Bus. Sys. Eng'g, Inc. v. Int'l Bus. Machs. Corp.*, 547 F.3d 882, 889 n.3 (7th Cir. 2008) ("Arguments not raised before the district court are waived on appeal."); *O'Neal v. City of Chicago*, 588 F.3d 406, 409 (7th Cir. 2009) ("[A]rguments not raised on appeal are waived.").

Nor can the defendants avoid waiver of the probable-cause affirmative defense by characterizing it as jurisdictional under *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). *See Int'l Union Pac. of Operating Eng'rs, Local 150, AFL-CIO v. Ward*, 563 F.3d 276, 282 (7th Cir. 2009) (finding that arguments that the court lacks jurisdiction are not waivable). The *Rooker-Feldman* doctrine denies federal jurisdiction to plaintiffs seeking to set aside a state court's judgment. But Tully does not seek to set aside the state court's judgment that probable cause of his guilt existed. Instead, he presents an "independent claim, albeit one that denies [the state court's] legal conclusion," and so another possible defense here was not a lack of jurisdiction, but rather res

judicata, *GASH Assocs. v. Vill. of Rosemont,* 995 F.2d 726, 728 (7th Cir. 1993), an argument that the defendants also waived by failing to raise.

In sum, Tully has managed to overcome the affirmative defenses of absolute immunity, the existence of probable cause, and res judicata, because the defendants waived them all. So we must reach the merits of the issue to which the parties devote their arguments, which is whether a plaintiff may assert a federal right not to be summoned into court and prosecuted without probable cause, under either the Fourth Amendment or the Fourteenth Amendment's Procedural Due Process Clause. The answer is no, as we held in *Bielanski v. County of Kane,* 550 F.3d 632, 642 (7th Cir. 2008) ("[A] summons alone does not equal a seizure for Fourth Amendment purposes. . . . [A] false accusation is not a seizure."), and *Penn v. Harris,* 296 F.3d 573, 576 (7th Cir. 2002) ("[T]here is no 'constitutional right not to be prosecuted without probable cause.'") (quoting *Newsome v. McCabe,* 256 F.3d 747, 751 (7th Cir. 2001)).

Our holding should not be misconstrued to deny any rights to parties whom prosecutors or other officials falsely accuse by way of fabricating evidence, withholding exculpatory evidence, tampering with witnesses, or committing any other independent constitutional violation, none of which Tully alleged in his complaint. Nor should it be misconstrued to deny any rights to parties unlike Tully who have been wrongfully jailed or imprisoned. These are different types of malicious prosecution claims. *See* Schwartz,

1 *Section 1983 Litigation* § 3.18[a], p. 3-596.2 (2008 Supplement) ("It is not particularly helpful to characterize the plaintiff's claim as a § 1983 malicious prosecution claim. In every § 1983 constitutional case, the plaintiff must identify the precise constitutional right or rights relied upon."). We hold only that a plaintiff cannot initiate a § 1983 claim asserting only that he was summoned and prosecuted without probable cause.

Having found that this particular type of "malicious prosecution" claim is untenable in federal courts – given that Tully alleged no facts to imply malice, his claim might be characterized more aptly as one for "negligent prosecution," *see Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 567 (1991) (Kennedy, J., dissenting); *Campbell v. City of San Antonio*, 43 F.3d 973, 981 (5th Cir. 1995); *Jeffers v. Heavrin*, 10 F.3d 380, 382 n.2 (6th Cir. 1993) -- we need not decide whether Indiana provides Tully an adequate post-deprivation remedy despite that it also recognizes an affirmative immunity defense for governmental actors acting within the scope of their employment. *See Newsome*, 256 F.3d at 750 ("[T]he existence of a tort claim under state law knocks out any constitutional theory of malicious prosecution."); *cf. Belcher v. Norton*, 497 F.3d 742, 754 (7th Cir. 2007) (finding that common law immunity deprives plaintiffs "of any meaningful avenue to seek redress" in state court for deprivation of property rights).

We find that Tully was not seized within the meaning of the Fourth Amendment merely by being

summoned to appear in court, and that he received procedural due process under the Fourteenth Amendment when the state court system vindicated him. To the extent any harm to his reputation remains, his recourse is to expunge the juvenile court's records. *See* Indiana Code §§ 31-39-8-1 et seq.

III. CONCLUSION

The district court properly found that a § 1983 claim cannot lie for a mere court summons and prosecution without probable cause. Therefore, its grant of the defendants' motion to dismiss is AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MICHAEL TULLY, Plaintiff, vs. RUSH COUNTY PROSECUTOR PAUL BARADA, in his individual capacity, and RUSH COUNTY JUVENILE PROBATION OFFICER CATHERINE CUSTER, in her individual capacity, Defendants.	)	1:08-cv-1243-LJM-DML

ORDER ON DEFENDANTS' MOTIONS TO DISMISS

This matter comes before the Court on two separate motions to dismiss filed by the Defendants, Rush County Prosecutor Paul Barada ("Barada"), in his individual capacity, and Rush County Juvenile Probation Officer Catherine Custer ("Custer") in her individual capacity (collectively, the "Defendants"). Plaintiff, Michael Tully ("Tully"), initiated this 42 U. S. C. § 1983 action against the Defendants for allegedly violating his rights under the Fourth and Fourteenth Amendments to the United States Constitution. The Court has considered the parties' arguments and, for

the following reasons, Defendants' motions to dismiss are **GRANTED**.[1]

I. BACKGROUND

For purposes of these Rule 12(b)(6) motions, the Court accepts as true the well-pleaded factual allegations from the Complaint. *See Killingsworth v. HSBC Bank Nevada, N.A.*, 507 F.3d. 614, 618 (7th Cir. 2007). On December 23, 2006, Tully, then age 17, went raccoon hunting with a friend, armed with a .22 caliber rifle and a spotlight. Comps. ¶ 7. They drove Tully's father's truck to a bridge on County Road 350 East in Rush County, Indiana. *Id.* ¶ 8. Tully parked the truck on the side of the road, where his friend exited (gun in hand), crossed the road, and walked down into a ditch. *Id.* ¶ 9. Tully shined the spotlight on two raccoons that came out from under the bridge. *Id.* ¶ 10. Tully's friend fired at the raccoons, killing one of them. *Id.* He was not standing on the road when he shot the raccoon. *Id.* They deposited their quarry in the back of the truck and Tully drove away. *Id.* ¶ 11.

At roughly the same time, Wayne Elwell ("Elwell") was in his home, approximately 300-350 feet from the bridge. *Id.* ¶ 12. Elwell saw the truck's headlights near the bridge. *Id.* ¶ 13. He also saw a spotlight,

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[1] In addition, after an examination of the briefs and Tully's Complaint, the Court concludes that oral argument is unnecessary. Therefore, Tully's motion for oral argument is **DENIED**.

which he mistakenly believed originated from near the truck. *Id.* In reality, the light was coming from down in the ditch. *Id.* A short time later, Elwell heard a gunshot coming from the general direction of the truck. *Id.* ¶ 14. He called the Sheriff's Department to report the gunfire. *Id.* ¶ 15. Shortly thereafter, Elwell heard a second shot. *Id.* ¶ 16. He looked out the window, saw someone go into the ditch, and called the Sheriff a second time. *Id.*

Deputy Sheriff Randy Chandler ("Deputy Chandler") responded to Elwell's call, but by the time he arrived at the bridge, no one was there. *Id.* ¶ 17. Deputy Chandler turned around to follow Tully's truck, which had just passed him, heading in the opposite direction. *Id.* Deputy Chandler drove at a high rate of speed to catch up with Tully, but did not turn on his siren or emergency lights. *Id.* ¶ 18. Tully, ever mindful of the posted speed limit, pulled into a parking lot to allow what he perceived to be an irate driver to pass. *Id.* Only then did Deputy Chandler turn on his emergency lights and approach Tully's truck. *Id.*

Deputy Chandler questioned Tully regarding the gun, and Tully eventually retrieved it from the back seat and handed it to Deputy Chandler. *Id.* ¶ 19. Deputy Chandler asked Tully what he and his friend had shot; Tully said it was a raccoon. *Id.* Deputy Chandler asked Tully whether he knew it was wrong to shoot from a roadway. *Id.* Tully responded that he did, but did not understand the question to be an accusation. *Id.* Deputy Chandler did not arrest Tully

and his friend, and allowed them to leave. *Id.* In no other way did Deputy Chandler indicate to Tully that he was suspected of firing from the roadway. *Id.* ¶ 23.

About a month after the incident, Tully and his parents received a letter instructing them to visit the Rush County Probation Department. *Id.* ¶ 26. Chief Probation Officer Mark Fields informed the Tully family that Tully and his friend were being charged as juveniles for shooting from a roadway. *Id.* ¶ 27. Custer, the Rush County Juvenile Probation Officer, conducted a Preliminary Inquiry and Investigation ("Preliminary Report"). *Id.* ¶ 28. Custer's Preliminary Report concluded that Tully had fired from the roadway in violation of Ind. Code § 14-22-6-9. *Id.* Custer recommended court disposition and that Tully be placed on formal probation, prohibiting him from possessing a firearm until he turned 18. *Id.* ¶ 29.

On February 28, 2007, Barada filed a Verified Petition of Delinquency ("Petition") in the Rush County Juvenile Court, although he had no personal knowledge of the events that transpired during the night in question. *Id.* ¶¶ 32, 24. In the Petition, Barada swore under penalty of perjury that:

> On or about the 23rd day of December, 2006, Rush County, Indiana, MICHAEL TULLY did hunt, shoot, shoot at, or kill an animal; or shoot at an object; from within, into, upon, or across a public highway in Indiana, all of which is against the peace and dignity of the State of Indiana and contrary to the form of the statute in such case made and provided

> to-wit: 1.C. 14-22-6-9 and would constitute a Class 'C' Misdemeanor if committed by an adult.

Id. Barada did not interview Elwell until March 1, 2007, the day after he filed the Petition. *Id.* ¶¶ 32, 36. Even then, Elwell did not attest to seeing Tully fire from the road. *Id.*

The Petition was approved by Judge Brian D. Hill of the Rush County Juvenile Court on March 5, 2007. *Id.* ¶ 37. A fact-finding hearing was held on April 26, 2007, which was continued on May 17, 2007. *Id.* ¶ 39. At the hearing, Elwell testified, but never stated that he saw Tully or anyone else fire a weapon from the truck or from the road. *Id.* ¶ 40. At the conclusion of the hearing, Tully was adjudicated a delinquent child. *Id.* ¶ 41. A dispositional hearing was held on May 31, 2007, at which Tully was placed on probation for six months, given a 10:00 p.m. curfew, and ordered to pay $317.00 in various fees and court costs. *Id.* ¶ 42. On that same day, Barada dismissed the charges against Tully's friend, for lack of "trial quality evidence." *Id.* ¶¶ 43-44. The charges against Tully's friend were based on the same evidence that was used to adjudicate Tully. *Id.*

Tully appealed his adjudication to the Indiana Court of Appeals, which reversed on December 28, 2007. *Id.* ¶¶ 45-46; Dkt. No. 1(6). The Court of Appeals found the evidence in support of Tully's adjudication insufficient to conclude beyond a reasonable doubt that Tully fired a weapon from a roadway. *Id.*

¶ 46; Dkt. No. 1(6). The court noted that the only evidence supporting the juvenile court's finding was the testimony of Elwell, who never testified to seeing any shots fired from the road. *Id.* ¶ 47; Dkt. No. 1(6) at 5. The court concluded that to draw an inference from Elwell's testimony that Tully fired a weapon from the road "stretches the concept of circumstantial evidence beyond its breaking point" Dkt. No. 1(6) at 5. The court further concluded that "Elwell's testimony amount[ed] only to a scintilla of evidence that someone might have fired a gun from within or across the road. It [was] not substantial and probative of [Tully's] guilt." Complaint ¶ 47; Dkt. No. 1(6) at 5 (emphasis in original).

After the Court of Appeals reversed his adjudication, Tully filed this Complaint, alleging that it was unreasonable for Custer and Barada to believe there was probable cause that Tully fired a weapon from a public road. *Id.* ¶¶ 49, 51; Doc. No. 1(6) at 5. Custer and Barada's conduct caused Tully to be wrongfully adjudicated a delinquent and placed on probation, which in turn caused Tully to suffer emotional distress, mental anguish, embarrassment, humiliation, loss of liberty, and damages. *Id.* ¶¶ 52-53. In addition, Tully alleged that Custer acted as a complaining witness when she stated in her Preliminary Report that Tully fired a weapon from a highway. *Id.* ¶ 58. By making such a statement without probable cause to believe in its truth, Custer acted intentionally, maliciously, recklessly, and in bad faith. *Id.* ¶ 59. Tully also alleged that Barada acted as a complaining

witness when he attested to the facts stated in the Petition and swore to their truth. *Id.* ¶ 56. By affirming under penalty of perjury the truth of the allegations in the Petition without probable cause to believe in their truth, Barada acted intentionally, maliciously, recklessly, and in bad faith. *Id.* ¶ 57. Lastly, and most importantly for purposes of these motions, Tully alleges that Custer and Barada's actions violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution. *Id.* ¶ 60.

II. STANDARD

A pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but a plaintiff's complaint may not merely state "an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal,* 556 U.S. ___, 129 S.Ct. 1937, 1949 (2009). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S. Ct. 1955 (2007)). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement." *Id.* (quoting *Twombly,* 550 U.S. at 557). Rather, "a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly,* 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable

inference that the defendant is liable for the misconduct alleged[,]" not when the plaintiff only raises a "sheer possibility that the defendant has acted unlawfully." *Id.*[2]

III. DISCUSSION

Defendants contend that Tully's Complaint attempts to assert a violation of his purported right to be free from prosecution without probable cause. Defendants argue that, because there is no constitutional right to be free from prosecution without probable cause, Tully has failed to state a § 1983 claim upon which relief may be granted.

The Court agrees. The first step in any § 1983 cause of action is to identify the specific constitutional right that was allegedly violated. *Graham v. Connor,* 490 U.S. 386, 394 (1989); *Kernats v. O'Sullivan,* 35 F.3d 1171, 1175 (7th Cir. 1994). Based on the face of Tully's Complaint, it is clear that Tully has sued the Defendants for what amounts to the alleged deprivation of his right to be free from prosecution without probable cause. Compl. ¶ 60. However, "there is no constitutional right not to be prosecuted without

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[2] Defendant Custer filed her motion to dismiss after filing her answer. *Compare* Doc. No. 16, *with* Doc. No. 20. Therefore, her motion to dismiss is actually a Rule 12(c) motion for judgment on the pleadings. *McMillan v. Collection Professionals, Inc.*, 455 F.3d 754, 757 n.1 (7th Cir. 2006). Such motions are evaluated under the same standards as a Rule 12(b)(6) motion. *Id.*

probable cause." *Penn v. Harris*, 296 F.3d 573, 576 (7th Cir. 2002). Therefore, based on the face of his Complaint, Tully has failed to state a viable § 1983 claim. *Id.*

Tully attempts to save his Complaint in his briefs, by arguing that although he entitled his cause of action "Malicious Prosecution – § 1983," his Complaint successfully states a Fourth Amendment violation. *Compare* Compl. at § V., with *id.* ¶ 60. Tully's Complaint alleges only that the Defendants caused Tully to be "maliciously prosecuted, falsely adjudicated a delinquent child, and placed on probation, therefore depriving him of rights, privileges, and immunities guaranteed by the Fourth [Amendment] . . . to the United States Constitution." *Id.* ¶ 60. These allegations do not state a Fourth Amendment violation, because Tully's Complaint does not contain an allegation that he was subjected to an unreasonable search. *Compare generally* Compl., *with* U.S. CONST. amend. IV. Nor does Tully's Complaint contain any contention that his person or property was unreasonably seized at anytime during the Defendants' investigation. *Compare generally* Compl., *with* U.S. CONST. amend. IV. A mere mention of the Fourth Amendment, without any factual allegation indicating a search or a seizure took place, let alone an unreasonable one, is not sufficient to state a § 1983 claim. *Iqbal*, 556 U.S. ___, 129 S.Ct. 1937 at 1949-1950.

Apparently, Tully would like the Court to adopt the view that being summoned to his April 26, 2007,

fact-finding hearing was a seizure within the contemplation of the Fourth Amendment. However, the Seventh Circuit has already rejected this notion. See *Bielanski v. County of Kane*, 550 F.3d 632, 642 (7th Cir. 2008) ("[W]e conclude that a summons alone does not equal a seizure for Fourth Amendment purposes. . . . [A] false accusation is not a seizure."). Tully's purported interest in not being prosecuted groundlessly is not an interest that the Fourth Amendment protects. *Bielanski*, 550 F.3d at 638 (citing *Wallace v. City of Chicago*, 440 F.3d 421, 425 (7th Cir. 2006); *Wiley v. City of Chicago*, 361 F.3d 994, 998 (7th Cir. 2004)). Similarly, after Tully's initial April 26, 2007, fact-finding hearing, the Fourth Amendment "drops out of the picture," thereby foreclosing any claims based upon his subsequent adjudication or the imposition of conditions of probation. *See Bielanski*, 550 F.3d at 642 (quoting *Hernandez v. Sheahan*, 455 F.3d 772, 777 (7th Cir. 2006)).

Tully also attempts to save his Complaint by drawing the Court's attention to allegations in his Complaint that the Defendants' conduct violated his rights under the Fourteenth Amendment. Compl. ¶ 60. Tully relies upon the procedural component of the Fourteenth Amendment, as the Seventh Circuit has already determined that substantive due process does not provide protection from malicious prosecution. *See Newsome v. McCabe*, 256 F.3d 747, 751 (7th Cir. 2001) ("Claims of malicious prosecution should [not] be analyzed . . . under . . . substantive due process. . . ."). However, Tully has confused the

impact that procedural due process may have on the availability of a cause of action for malicious prosecution, with the incorrect notion that the Defendants have somehow violated his procedural due process rights by maliciously prosecuting him.

In *Newsome,* the Seventh Circuit distilled a two-part test from Justice Kennedy's concurring opinion in *Albright v. Oliver,* 510 U.S. 266 (1994), for determining when a plaintiff may have a constitutional tort claim for malicious prosecution. *Newsome*, 256 F.3d at 750-51. First, the plaintiff must demonstrate that he did not have "an adequate opportunity to defend himself in the criminal prosecution." *Id.* In other words, was the plaintiff denied a "fair trial" due to a violation of one of his constitutional rights? *See id.* at 752 ("Newsome . . . did not receive a fair trial if the prosecutors withheld material exculpatory details.") (citing *Brady v. Maryland*, 373 U.S. 83 (1963)). As stated above, Tully's Complaint essentially asserts a violation of his right to be free from prosecution without probable cause. This right is not protected by the Constitution. *Penn,* 296 F.3d at 576; *see also Albright,* 510 U.S. at 283 (Kennedy, J., joined by Thomas, J., concurring) ("In sum, the due process requirements for criminal proceedings do not include a standard for the initiation of criminal prosecution."). Therefore, Tully's Complaint does not make it past the first step of *Newsome's* two-part test. *See Newsome*, 256 F.3d at 750-51.

It is only after the first step of *Newsome's* two-part inquiry is satisfied that a court goes on to

consider the second step: Does a state court provide the plaintiff with an adequate opportunity to obtain compensation for the violation of one of his constitutional rights that resulted in the plaintiff being denied a fair trial? *Newsome*, 256 F.3d at 750-51 (holding that where state law provides a remedy for malicious prosecution (as Illinois law did in *Newsome*), there is no § 1983 claim available) (citing *Albright,* 510 U.S. at 283-286 (Kennedy, J., joined by Thomas, J., concurring)). Under this step, a court may someday be called upon to decide whether a defendant's immunity renders an otherwise available state law remedy inadequate, thereby violating the plaintiff's procedural due process rights. See *Daniels v. Williams,* 474 U.S. 327, 333 n.1 (1986) (declining to resolve "whether . . . the possibility of a sovereign immunity defense in a [state] tort suit would render that remedy "inadequate" under *Parratt* [*v. Taylor,* 451 U.S. 527, 543-44 (1981)] and *Hudson v. Palmer,* 468 U.S. 517[, 533] (1984))."); *see also Surplus Store and Exchange, Inc. v. City of Delphi,* 928 F.2d 788, 790 n.2 (7th Cir. 1991) (observing that the Indiana Tort Claims Act "may fail to provide an adequate remedy" because of its immunity provisions, but declining to resolve the issue); *see also Grosz v. Indiana,* 730 F.Supp. 1474, 1480 (S.D. Ind. 1990) (Tinder, J.) ("[I]f procedural due process requires a *meaningful* opportunity to be heard, then it seems that immunity in state court would foreclose such an opportunity and render the remedy inadequate.") (emphasis in original). Tully urges the Court to resolve the issue in this case, because the Defendants enjoy immunity

from any state action for malicious prosecution. *See* Ind. Code § 34-13-3-3(6) (The Indiana Tort Claims Act); *see also Livingston v. Consolidated City of Indianapolis*, 398 N.E.2d 1302, 1305 (Ind. Ct. App. 1972) ("[T]he legislature fully intended to extend immunity to the State of Indiana and other political subdivisions and their police officers in actions for malicious prosecution."). However, as Tully has failed to satisfy the first step of *Newsome's* two-part test, the Court declines to do so.

IV. CONCLUSION

For the foregoing reasons, the Motions to Dismiss of Defendants, Rush County Prosecutor Paul Barada, in his individual capacity, and Rush County Juvenile Probation Officer Catherine Custer, in her individual capacity, are **GRANTED**.

IT IS SO ORDERED this 7th day of August, 2009.

/s/ Larry J. McKinney
LARRY J. KINNEY, JUDGE
United States District Court
Southern District of Indiana

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Case 1:08-cv-01243-LJM-DML Document 42
Filed 08/07/09 Page 1 of 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MICHAEL TULLY, Plaintiff, vs. RUSH COUNTY PROSECUTOR PAUL BARADA, in his individual capacity, and RUSH COUNTY JUVENILE PROBATION OFFICER CATHERINE CUSTER, in her individual capacity, Defendants.	)	1:08-cv-1243-LJM-DML

ENTRY OF JUDGMENT

Through an order dated August 7, 2009, the Court granted the Motions to Dismiss of defendants, Rush County Prosecutor Paul Barada, in his individual capacity, and Rush County Juvenile Probation Officer Catherine Custer, in her individual capacity, as to all of plaintiff, Michael Tully's, claims. Plaintiff shall take nothing by way of his complaint.

DATED this 7th day of August, 2009.

/s/ Larry J. McKinney
LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

Laura A. Briggs, Clerk

BY: /s/ Laura R. Briggs
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Case 09-3237 Document: 16
Filed 04/22/2010 Pages: 1

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

April 22, 2010

Before

WILLIAM J. BAUER, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

MATTHEW F. KENNELLY, *District Judge**

No. 09-3237

MICHAEL TULLY,
Plaintiff-Appellant,

v.

RUSH COUNTY PROSECUTOR PAUL BARADA, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:08-cv-01243-LJM-DML

Larry J. McKinney, *Judge.*

ORDER

On consideration of plaintiff-appellant's petition for rehearing and rehearing *en banc* filed on April 1, 2010, in connection with the above-referenced case, all of the judges on the original panel have voted to

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* Hon. Matthew F. Kennelly, District Judge for the Northern District of Illinois, is sitting by designation.

deny rehearing and no judge in active service has requested a vote on the petition for rehearing *en banc*. It is, therefore, ORDERED that the petition for rehearing and rehearing *en banc* is DENIED.

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF M.P.T.,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

No. 70A04-0706-JV-326

APPEAL FROM THE RUSH CIRCUIT COURT
The Honorable Brian D. Hill, Special Judge
Cause No. 70C01-0702-JD-5

December 28, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

M.T. appeals his adjudication for being a delinquent child for shooting at an animal from or across a public highway. We reverse.

Issue

The dispositive issue is whether there is sufficient evidence to support the delinquency adjudication.

Facts

The evidence most favorable to the delinquency adjudication is that at about 8:30 p.m. on December 23, 2006, seventeen-year-old M.T. decided to go raccoon hunting with a friend, B.C. M.T. drove to a bridge on County Road 350 East in Rush County, accompanied by B.C.

Wayne Elwell lived about 300 to 350 feet from the bridge. He noticed M.T.'s vehicle near the bridge

and also saw a spotlight, apparently coming from the truck. He then heard a gunshot fired, but he did not see a flash or anything else to indicate from where the shot had been fired. Elwell called the Rush County Sheriff's Department and requested that a deputy come to the scene. Elwell then heard a second gunshot and saw someone in a ditch beside the road.

After the second shot was fired, M.T. drove away. Sheriff's Deputy William Chandler arrived on the scene shortly thereafter and passed M.T. heading in the opposite direction. Deputy Chandler then turned around and began chasing M.T. It took several miles and speeds in excess of 100 miles per hour before Deputy Chandler finally caught up with M.T. However, at no time had Deputy Chandler activated his emergency lights, until just before he approached M.T.'s already-stopped vehicle by the side of a road. M.T. was in the driver's seat of the vehicle and B.C. was a passenger. Deputy Chandler found in M.T.'s vehicle a loaded .22 caliber rifle, a handheld spotlight, and a dead raccoon.

On March 5, 2007, the State filed a petition alleging M.T. was a delinquent child, and the trial court approved the filing. The petition alleged that M.T. violated Indiana Code Section 14-22-6-9, which criminalizes hunting or shooting from or across a public highway. After a fact-finding hearing held on April 26 and May 17, 2007, the trial court found the

allegations of petition to be true and adjudicated M.T. to be a delinquent child.[1] M.T. now appeals.

Analysis

M.T. contends the State presented insufficient evidence to support the delinquency adjudication. If the State seeks to have a juvenile adjudicated to be a delinquent for committing an act that would be a crime if committed by an adult, it must prove every element of the crime beyond a reasonable doubt. *J.S. v. State*, 843 N.E.2d 1013, 1016 (Ind. Ct. App. 2006), *trans. denied*. Upon review of a delinquency adjudication, we will consider only the evidence and reasonable inferences supporting the judgment. *Id.* "We will neither reweigh the evidence nor judge witness credibility." *Id.* If there is substantial evidence of probative value from which a reasonable trier of fact could conclude beyond a reasonable doubt that the juvenile committed the delinquent act, we will affirm the adjudication. *Id.*

We also observe that evidence of guilt of substantial and probative value, as required to affirm a delinquency finding on appeal, requires more than a mere scintilla of evidence. *See Short v. State*, 564 N.E.2d 553, 557 (Ind. Ct. App. 1991). Evidence that only tends to support a conclusion of guilt is insufficient to

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[1] Although B.C. originally had been charged with being a delinquent child for this incident, that proceeding was dismissed after M.T. was found to be delinquent.

sustain a conviction or adjudication, as evidence must support the conclusion of guilt beyond a reasonable doubt. *See id.* (citing *Vuncannon v. State*, 254 Ind. 206, 258 N.E.2d 639 (1970)). Circumstantial evidence must do more than merely tend to arouse suspicion of guilt in order to support a conviction or delinquency finding. *See Marrow v. State*, 699 N.E.2d 675, 677 (Ind. Ct. App. 1998).

The State alleged that M.T. violated Indiana Code Section 14-22-6-9, which provides: "A person may not: (1) hunt, shoot, shoot at, or kill an animal; or (2) shoot at an object; from within, into, upon, or across a public highway in Indiana." The offense is a Class C misdemeanor if committed by an adult. *See* Ind. Code § 14-22-38-1. On appeal, the State's sufficiency argument focuses solely upon whether M.T. shot or shot at raccoons from the road, not whether he hunted or killed them from the road.

Here, Elwell was the only testifying witness to the gunshots that were fired in the general vicinity of M.T.'s vehicle. Although we say "witness," however, Elwell never testified that he saw any shots being fired "from within, into, upon, or across" County Road 350 East. The State argues that it nevertheless can be inferred that one or both gunshots were fired from M.T.'s vehicle while it was on the road. We conclude that making such an inference beyond a reasonable doubt in this case stretches the concept of circumstantial evidence beyond its breaking point.

We keep in mind that this incident occurred well after sundown. As for the first gunshot, there does not appear to be any testimony by Elwell that he even was looking in the general direction of M.T.'s vehicle when he heard it. In fact, he testified, in response to the prosecutor's question, that he was unable "to see a flash or anything that would indicate . . . where the shot was coming from." Tr. p. 45. With respect to the second gunshot, Elwell testified, "I stood there in the window and kept watching and a short period of time later I see the vehicle move in reverse, hear the second shot. I see someone going into the ditch. I made my second call to the Sheriff's Department." Tr. p. 45. This testimony was not followed by any questions as to whether Elwell actually could see from where the shot had been fired. Nor is the testimony clear that Elwell saw someone exit the vehicle only after the second shot had been fired. The testimony also does nothing to refute the possibility that someone already was outside the vehicle when the shot was fired.

Both M.T. and B.C. were raccoon hunting. It is impossible to discern from Elwell's testimony that any gunshots were fired from M.T.'s vehicle while it was on County Road 350 East, or across or from within that road, as opposed to being fired by someone standing off the side of the road while the other person drove the vehicle and/or shined a spotlight on raccoons from the vehicle. In sum, Elwell's testimony amounts only to a scintilla of evidence that someone *might* have fired a gun from within or across the

road. It is not substantial and probative evidence of M.T.'s guilt.

The State also asserts that there is evidence of M.T.'s guilt in his alleged high-speed flight from Deputy Chandler. It is questionable whether M.T.'s driving away from the scene could be considered "flight," when Deputy Chandler did not activate his emergency lights until after he came upon M.T.'s vehicle already stopped by the side of the road. In any event, evidence of flight is not probative unless tied to some other evidence that is strongly corroborative of the actor's intent to commit a specific crime. *Anderson v. State,* 774 N.E.2d 906, 910 (Ind. Ct. App. 2002). The other evidence must provide a solid basis to support a reasonable inference that the defendant intended to commit the underlying, specifically charged crime. *Id.* The crime M.T. allegedly committed was a violation of an obscure hunting statute; it was not an obvious wrongful act, unlike murder or robbery, for example. We already have recounted the weakness of the circumstantial evidence that M.T. violated that statute. We cannot say M.T.'s alleged flight from the scene is strongly corroborative of any intent on M.T.'s part to violate the statute.

Conclusion

There is insufficient evidence to support M.T.'s delinquency adjudication. We reverse.

Reversed.

SHARPNACK, J., and VAIDIK, J., concur.

STATE OF INDIANA)		IN THE RUSH
	) SS:	JUVENILE COURT
COUNTY OF RUSH)		2007 TERM

IN THE MATTER OF	)	
MICHAEL TULLY,	)	CAUSE NO.
A Child Alleged to be	)	70C01 0702 JD 005
a Delinquent Child	)	

VERIFIED PETITION OF DELINQUENCY

FILED
FEB 28 2007
RUSH CO CLERK
CIRCUIT COURT

Comes now Paul W. Barada, Jr., Prosecuting Attorney for the 65th Judicial Circuit of the State of Indiana, being duly sworn upon his oath, and states as follows:

1. This Court has jurisdiction of this proceeding pursuant to I.C. 31-30-1-1.

2. On or about the 23rd day of December, 2006, Rush County, Indiana, MICHAEL TULLY did hunt, shoot, shoot at, or kill an animal; or shoot at an object; from within, into, upon, or across a public highway in Indiana, all of which is against the peace and dignity of the State of Indiana and contrary to the form of the statute in such case made and

provided to-wit: I.C. 14-22-6-9 and would constitute a Class "C" Misdemeanor if committed by an adult.

3. The date of birth of MICHAEL TULLY is [Date Of Birth Omitted] and he is seventeen (17) years of age. He resides with his parents, Thomas & Carol Tully, at [Home Address Omitted].

WHEREFORE, your Petitioner prays the Court approve the filing of the Petition, set this matter for hearing and for all other relief just and proper in the premises.

/s/ Paul W. Barada, Jr.
Paul W. Barada, Jr. 19987-70
Prosecuting Attorney
65th Judicial Circuit

I AFFIRM UNDER THE PENALTIES OF PERJURY THE ABOVE STATEMENTS ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

DATE: 2/28/07 /s/ Paul W. Barada, Jr.
Paul W. Barada, Jr.

Rush County Prosecutor
Third Floor, Rom 317, Courthouse
Rushville, IN 46173
(765) 932-2000

Case 1:08-cv-01243-LJM-JMS Document 1-2
Filed 09/16/2008 Page 1 of 5

STATE OF INDIANA
RUSH JUVENILE COURT

70C01 0702 JD 005

In the matter of Michael Patrick Tully
Child Alleged to be a Delinquent Child

INTAKE OFFICER'S REPORT OF PRELIMINARY INQUIRY AND INVESTIGATION IC 31-6-4-7(b)

(Filed Feb. 28, 2007)

CHILD'S NAME: Micahel [sic] Tully

ADDRESS: [Home Address Omitted]

AGE: 17 BIRTHDATE: [Date Of Birth Omitted]
SEX: Male RACE: Cau HEIGHT: 5'7"
WEIGHT: 130 HAIR: Brown EYES: Brown

CRIME OR CONDITION ALLEGED:
Shooting from Public Highway

DATE: 12-23-06

Location: CR 350 E just S of CR 225 N

Particulars of:

Alleged Crime or Condition:
Shooting from Public Highway

Complainant's Name: Wayne Elwell

Address: [Home Address Omitted]

Name of Investigating Officer:
Randy Chandler

Title:
Deputy 7049, Rush County Sheriff's Department

Witness to Offense: Address:

Witness to Offense: Address:

Witness to Offense: Address:

CURRENT STATUS OF CHILD:

Said child has committed a delinquent act pursuant to IC 31-6-4-1(a), in that the child:

(X) committed an act that would be an offense if committed by an adult, except an act committed by a person over which the juvenile court lacks jurisdiction under IC 31-6-2-1(d);

( ) left home without reasonable cause and without permission of the child's parents, guardian or custodian who requests the return of the child;

( ) violated the compulsory school attendance law;

( ) habitually disobeyed the reasonable and lawful commands of the child's parent, guardian or custodian;

Said child is a delinquent child as defined by IC 31-6-4-1(b), in that he:

(X) committed an act that would be an offense if committed by an adults, or

( ) committed a delinquent act as indicated above and needs care, treatment or rehabilitation that the child is not receiving, that the child is unlikely to accept voluntarily and that is unlikely to be provided or accepted

without the coercive intervention of the Court.

FAMILY BACKGROUND:

FATHER:

Name: Thomas Tully

Address: Same as child Marital Status: Married

Phone: [Omitted] Employment: Farming

MOTHER:

Name: Carol Tully

Address: Same as child Marital Status: Married

Phone: [Omitted] Employment: Rush Memorial Hospital

Who has custody: Parents

Address:

Step-parents:

SIBLINGS:

Name none Age Where Living Juvenile or Criminal Record

Matthew Tully, 18, resides at home,

Other:

HOME AND NEIGHBORHOOD: Michael resides with his family in rural Rush County. Michael gets along well with his family members and does what is asked of him a thome [sic].

SCHOOL:

Last grade attended: 11 Where: Rushville Consolidated High School

Presently in school? Yes If not, why not?

School problems: None

Suspensions and expulsions: None

Academics: Michael usually makes A's and B's in school.

Activities: Michael is a member of the baseball and tennis team. He is a member of cheerblock, SADD, and FFA, and Varsity Scholars.

Future Plans: Michael would like to attend Purdue and possibly major in agri-business.

EMPLOYMENT:

Presently employed? No If yes, what are the hours?

Where employed? Pay:

Past employment: Michael has detassled corn for the past four years. He plans on detassling corn this year as well.

JUVENILE'S HEALTH: None

MENTAL STATUS:

Psychological and/or family counseling: None

Is counseling and/or testing recommended at this time?

PREVIOUS OFFENSES: None

DETENTION: None

If yes, when? Where?

By whose authority? Released:

JUVENILE'S ATTITUDE:

JUVENILE'S INTEREST AND ACTIVITIES: Juvenile enjoys hunting in his spare time.

OTHER PERTINENT INFORMATION:

RECOMMENDATIONS:

(X) Filing of petition (X) DELINQUENCY
( ) CHINS

( ) Informal Adjustment
( ) DELINQUENCY ( ) CHINS

( ) Restrictive placement should be considered

( ) Dismiss (No probable cause)

( ) Waiver

Recommended Court Disposition: Formal probation, no possession of a firearm or dangerous or deadly weapon until the age of 18 unless under direct supervision of child's father.

Reason for Recommendation: Julie Newhouse is child's attorney. Child was not willing to admit to Shooting from a Public Highway. It is my understanding from talking with Gary Catron that this statute includes the pursuit of animals, searching, looking for from a roadway. Julie wanted the child to admit to having a loaded firearm in the truck. According to Gary Catron, having the loaded gun is

not illegal and Shooting from a Public Highway is the proper statute. Due to this conflicting information, an informal adjustment would not be appropriate.

Dated: 2-27-07 /s/ Catherine Custer
Signature

CERTIFICATE OF SERVICE

This certifies that a copy, of the above and foregoing report was mailed to or served on the following person representing the interests of the State: Paul Barada Jr. this 27th day of February, 2007.

/s/ Catherine Custer
Signature

STATE OF INDIANA	)	IN THE RUSH
	) SS:	JUVENILE COURT
COUNTY OF RUSH	)	2007 TERM

IN THE MATTER OF	)	
MICHAEL TULLY	)	CAUSE NO.
A Child Alleged to be	)	70C01 0702 JD 005
a Delinquent Child	)	

SUMMONS

To: Michael Tully
[Home Address Omitted]

You are hereby notified that a Verified Petition of Delinquency, attached hereto, has been filed in the above Court charging the above named child with being a delinquent child. You are hereby commanded to appear before the Judge of said Court at the Courthouse, 3rd Floor, in Rushville, Indiana, on the 15th day of March, 2006 at 2:00 P.M., for initial hearing and such further proceeding as may be ordered by the Court in this matter.

If you fail to appear as above commanded, you may be held in Contempt of Court, and a warrant may be issued by the court.

DATED this 6th day of March, 2007.

/s/ Lida K. Shuler
Clerk, Rush Juvenile Court

By: /s/ Ann Frazier
Deputy Clerk

SERVICE

DATE:_____
METHOD: Sheriff

Distribution:

Paul W. Barada, Jr.
Catherine Custer

State of Indiana
Rush County Sheriff's Office
Civil Division
Rushville, IN 46173

(Filed Mar. 8, 2007)

Process Number: 41300 Court Number: 70C010702"JD005

I, Jeffery D. Sherwood, Sheriff of Rush County Sheriff's Office do hereby certify that I received the within and foregoing Summons on 7th day of March, 2007, and that I served the same on:

Michael P Tully (Defendant)
[Home Address Omitted]

Served on: 7th day of March, 2007 at 20:00:00 by D Sliger Defendant

Served to: Michael Tully
[Home Address Omitted]

Returned on the 8th day of March, 2007

I also certify that I endorsed on the said copy the date of service, signed my name, and added my official title thereto.

Dated the 8th day of March, 2007

Fees:

Service :	0.00	Jeffery D. Sherwood, Sheriff
Mileage:	0.00	Rush County Sheriff's Office,
Other :	0.00	Indiana
Total :	0.00	BY: Sheriff Jeff Sherwood
		Authorized Representative
		Civil Division

My commission expires:

_____ _____

Notary Public

STATE OF INDIANA	)	IN THE RUSH
	) SS:	JUVENILE COURT
COUNTY OF RUSH	)	2007 TERM

IN THE MATTER OF	)	
MICHAEL TULLY	)	CAUSE NO.
A Child Alleged to be	)	70C01 0702 JD 005
a Delinquent Child	)	

SUMMONS

To: Thomas & Carol Tully
[Home Address Omitted]

You are hereby notified that a Verified Petition of Delinquency, attached hereto, has been filed in the above Court charging the above named child with being a delinquent child. You are hereby commanded to appear before the Judge of said Court at the Courthouse, 3rd Floor, in Rushville, Indiana, on the 15th day of March, 2006 at 2:00 P.M., for initial hearing and such further proceeding as may be ordered by the Court in this matter.

If you fail to appear as above commanded, you may be held in Contempt of Court, and a warrant may be issued by the court.

DATED this 6th day of March, 2007.

/s/ Lida K. Shuler
Clerk, Rush Juvenile Court

By: /s/ Ann Frazier
Deputy Clerk

SERVICE

DATE:_____
METHOD: Sheriff

Distribution:

Paul W. Barada, Jr.
Catherine Custer

State of Indiana
Rush County Sheriff's Office
Civil Division
Rushville, IN 46173

(Filed Mar. 8, 2007)

Process Number: 41300 Court Number: 70C010702"JD005

I, Jeffery D. Sherwood, Sheriff of Rush County Sheriff's Office do hereby certify that I received the within and foregoing Summons on 7th day of March, 2007, and that I served the same on:

Thomas J Tully (Defendant)
[Home Address Omitted]

Served on: 7th day of March, 2007 at 20:00:00

by D Sliger
Defendant

Served to: Thomas Tully
[Home Address Omitted]

Returned on the 8th day of March, 2007

I also certify that I endorsed on the said copy the date of service, signed my name, and added my official title thereto.

Dated the 8th day of March, 2007

Fees:

Service :	0.00
Mileage:	0.00
Other :	0.00
Total :	0.00

Jeffery D. Sherwood, Sheriff
Rush County Sheriff's Office, Indiana

BY: Sheriff Jeff Sherwood
Authorized Representative
Civil Division

My commission expires:

_____ _____

Notary Public

STATE OF INDIANA

RUSH SUPERIOR COURT

IN THE MATTER OF: Michael Tully
A Child Adjudicated to
be a Delinquent Child

CASE NO: 70~~D~~C01-0702-JD-005

CONDITIONS OF PROBATION (JUVENILE)

(Filed May 31, 2007)

You have been placed on probation for a period of ~~one year~~ [6 months /s/ BDH] because the Court believes you can, with the assistance of your Probation Officer, stay out of trouble. Probation is an opportunity for those who are willing and able to be helped and who can be trusted to make a conscientious effort to help themselves. It is for young persons who are willing to cooperate with both the Court and the Probation staff and who are, in all respects, equally willing to be honest and sincere in all of their efforts.

As part of your responsibility in the probationary supervision plan, the court is requiring you to comply with certain terms and conditions, which the Court feels will be of benefit to you in your circumstances. Those terms and conditions that will be applicable during the period you are on probation are as follows:

1. You shall report to the Probation Department at such times and places as shall be directed by that department. Any change of address, school or

employment must be promptly reported to the Probation Department.

2. You are at all times to obey your parents, guardians or other persons having legal custody of you.

3. You are to have the express permission of your parents for any activities and/or programs that require you to be away from your home.

4. You are to be in the confines of your home by ~~7:00 p.m.~~ [Midnight /s/ BDH] on weekdays and weekends unless any of the following occur: you are in the presence of at least one of your parents; you are in the presence of a responsible adult known to and approved by your parents or Probation Officer; you are engaged in paid employment, or a school or church sponsored activity [4-H activity, FFA /s/ BDH] known to and approved by your parents or Probation Officer

5. You are to be very careful as to the people with whom you associate and you shall not associate with any persons, adult or juvenile, who are, or who have been, involved in any criminal or delinquent activity. You shall not attend any places of ill repute or visit any places of improper amusement or other activity. If you have questions about whether a person falls in this category, it is your responsibility to ask the Probation Officer.

6. You are to attend school regularly with no absences or tardiness of an unexcused nature, and you shall diligently apply yourself to your schoolwork all the time conducting yourself according

to school policy. Quitting of school without adequate reason, suspension from school and/or expulsion from school will constitute a violation of probation. If, for any reason, you are not attending school, you are to find suitable employment with reasonable working hours.

7. If suspended, expelled or not attending school for any reason, you shall not be within 1000 feet of school property from one hour before school to one hour after school.

8. You are not, under any circumstances, to purchase, possess, consume or use an alcoholic beverage, intoxicating liquor, marijuana, drug or controlled substance of any kind unless legally prescribed to you by a licensed physician. Similarly, you are not to use any type of glue, gasoline, kerosene or any other material that might be sniffed, consumed or ingested in any other manner. You shall not use hemp products.

9. You shall not possess any firearms, destructive devices or other dangerous or deadly weapon.

10. You are to comply with urinalysis drug testing and submit to a breath test as ordered by the Probation Officer.

11. You are to obey all town, city, county, state and federal laws and ordinances. Arrest for any crime shall constitute violation of probation. You shall commit no acts of bad conduct of any kind or character.

~~12.~~ You are to participate in the following programs and/or activities specifically assigned and outlined as part of your supervisory probation program: NONE

~~13.~~ You shall pay the sum of _____ in restitution to the Rush Superior Clerk for _____ at _____ at the rate of _____.

14. You are to pay, through the Rush County Clerk's Office, a Monthly Probation Fee of $10.00 on or before the 10th day of each month thereafter during the period you are on probation. You are to pay one hundred dollars ($100.00) for a probation administrative fee and one hundred fifty-seven dollars ($157.00) court costs.

15. You shall permit the Probation Officer to visit you at reasonable times and places. You shall agree to a search of your person and property by the Probation Officer at any time. You shall waive your right against unreasonable searches by the Probation Department or anyone acting on behalf of the Department, for the purpose of ensuring compliance with your Order of Probation.

16. You are entitled to have a formal hearing eighteen (18) months from this date, or earlier if justifiable reasons exist, to determine whether or not your Court-Ordered terms and conditions of conduct should continue, be discontinued or be modified. Remember that both the Court and its Probation Department are at all times ready to assist you in any way possible. Feel free to come to the Probation Officer at any time.

ALL OF WHICH IS CONSIDERED, ORDERED, ADJUDGED AND DECREED THIS 31 DAY OF May, 2007.

/s/ Brian D. Hill
BRIAN D. HILL
JUDGE, RUSH
SUPERIOR COURT

/s/ Catherine Custer
CATHERINE CUSTER
PROBATION OFFICER

The undersigned, being the parents, guardian or custodian or the child under probationary supervision, hereby acknowledge and consent to the above conditions of Probation. We further agree to participate fully and without exception in any probation-oriented program or activity and agree, without exception, to keep the Probation Department fully informed of the child's progress while on probation and, similarly, of any problems and/or violations that might occur.

/s/ Michael Tully
CHILD

/s/ Thomas Tully
PARENT, GUARDIAN, CUSTODIAN

/s/ Carol Tully
PARENT, GUARDIAN, CUSTODIAN

CUSTODIAN CLERK'S CERTIFICATE

I hereby certify that a copy of the foregoing has been mailed or delivered to Paul W. Barada Jr., [☑] Catherine Custer [☑], respondent child, the mother [☑] and the father [☑], respondent child's attorney [☑ /s/ JN] dated this 4th day of June, 2007.

/s/ Linda K. Sheehan
LINDA K. SHEEHAN
CLERK, RUSH
SUPERIOR COURT

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MICHAEL TULLY,

Plaintiff,

v.

RUSH COUNTY PROSECUTOR PAUL BARADA, In his individual capacity; and RUSH COUNTY JUVENILE PROBATION OFFICER CATHERINE CUSTER, In her individual capacity,

Defendants.

COMPLAINT

1-08-cv-1243-LJM-JMS, Filed 09/16/2008

I. PRELIMINARY STATEMENT

1. This is a complaint to redress the deprivation of rights, liberties and immunities secured to the Plaintiff under the Constitution and laws of the United States of America. This complaint seeks compensation for the Plaintiff for the violation of his rights as protected by the Fourth and Fourteenth Amendments to the United States Constitution.

II. JURISDICTION

2. Jurisdiction is proper in this Court according to 28 U.S.C. §§ 1331 and 1343(a)(3), this being a suit authorized by 42 U.S.C. § 1983 to redress the

deprivation of rights, privileges and immunities secured by the Fourth and Fourteenth Amendments to the United States Constitution.

3. Venue is proper in this court according to 28 U.S.C. § 1391, which allows for an action to be brought in the district and state where the defendants reside or in which the cause of action arose. All of the parties reside in the Southern District of Indiana and the events occurred in Rush County.

III. PARTIES

4. Plaintiff Michael Tully is and was at all times relevant to this action a resident of the City of Rushville, County of Rush, State of Indiana, United States of America.

5. Defendant Paul W. Barada is and was at all times relevant to this action the Prosecuting Attorney for Rush County, Indiana, acting outside the scope of his employment, and acting under color of state law. He is being sued in his individual capacity for his conduct on or around February 28, 2007.

6. Defendant Catherine Custer is and was at all times relevant to this action the Juvenile Probation Officer for Rush County, Indiana, acting within the scope of her employment, and acting under color of state law. She is being sued in her individual capacity for her conduct on or around February 13, 2007 and February 28, 2007.

IV. FACTUAL ALLEGATIONS

7. On December 23, 2006, at or around 8:30 p.m., Michael Tully, then age seventeen, and Brock Carfield, then aged sixteen, went raccoon hunting in Rush County Indiana. Michael and Brock brought with them Michael's .22 caliber rifle and a spotlight.

8. Michael drove his father's Chevy Avalanche to a bridge on County Road 350 East in Rush County.

9. When Michael arrived at the bridge, he parked on the side of the road. Brock got out of the truck with the gun, crossed the road, and walked into the ditch on the opposite side of the road.

10. Michael and Brock saw two raccoons come out from under the bridge. Michael shined the spotlight on them and Brock fired at them, killing one. Brock was not on the road when he fired at the raccoon.

11. Brock returned to Michael's vehicle with a dead raccoon, put the dead raccoon in the bed of the truck, and Michael drove away.

12. At roughly the same time, Wayne Elwell was in his home approximately 300-350 feet north of the bridge on County Road 350 East where Michael and Brock had stopped.

13. Elwell observed the headlights of a vehicle near the bridge. Elwell also saw a spotlight, which Brock had carried with him when he left the truck.

Elwell apparently mistakenly believed the light came from the truck.

14. A short time later, Elwell heard what he believed to be a gunshot coming from the direction of where he observed the vehicle near the road. However, Elwell was not looking in the direction of the bridge when he heard what he believed to be the gunshot, and he did not see anything indicating that a gun was fired from the area near the bridge.

15. Elwell called the Sheriff's Department to report what he had heard.

16. Elwell then heard what he believed was a second shot, and then saw someone go into the ditch. Elwell then placed a second call to the Sheriff's Department.

17. Rush County Sheriff's Department deputy officer Randy Chandler responded to Elwell's calls. While driving to the bridge and toward the residence of Elwell, Deputy Chandler observed a dark vehicle driving in the opposite direction. Deputy Chandler arrived at the bridge, but found that the vehicle had left. Deputy Chandler turned around to follow the vehicle that passed him on his way to the bridge.

18. Deputy Chandler followed, driving at a high rate of speed for approximately six miles, without his emergency lights or siren on. Michael, who had been driving within the speed limit, decided to pull into a parking lot to allow a seemingly irate driver pass. After allowing the vehicle to pass, Michael pulled back

onto the road. Chandler then turned around and pulled up behind the Michael's truck after Michael had stopped. Deputy Chandler then turned on his emergency lights and walked up to the vehicle.

19. Deputy Chandler asked the driver of the truck, Michael Tully, where the gun was. Michael pointed toward the backseat of the vehicle and retrieved it for the officer. Chandler asked if it was loaded, and, learning that it was, discharged it from the roadway into the ditch. Deputy Chandler then asked Michael what they shot at and where it was located. Michael responded that it was a raccoon, and it was in the bed of the vehicle. Deputy Chandler then asked both juveniles, Michael and Brock, whether they knew it was wrong to shoot from a roadway, and the youths responded that they understood that to be the law, but did not understand the question to be an accusation. Deputy Chandler also took Michael's spotlight. Deputy Chandler then let Michael and Brock leave in the truck with the raccoon.

20. Neither Michael nor Brock were asked if either one had shot from the road or from the truck.

21. Neither Michael nor Brock were informed of their rights.

22. Neither Michael nor Brock shot from the road, or from the truck, or in any way that violated Ind. Code § 14-22-6-9.

23. Deputy Chandler did not arrest Michael or Brock, nor did he indicate that they would be charged with firing from a roadway.

24. Deputy Chandler did instruct Michael to tell his parents what happened and to call the Sheriff to come pick up the gun and spotlight.

25. Michael's father, Tom Tully, retrieved the gun and spotlight from the Sheriff approximately five days later.

26. Approximately one month following the incident, Michael's parents, Tom and Carol Tully, received a letter instructing them to visit the Rush County Probation Department to discuss the events of December 23, 2006. If they failed to respond, they would be subject to sanctions from the court.

27. Rush County Chief Probation Officer Mark Fields informed Tom and Carol Tully that Michael and Brock were being charged as juveniles with shooting from a public highway in violation of Ind. Code § 14-22-6-9. Tom and Carol went to get the charges and the police report.

28. The Rush County Probation Department later conducted a Preliminary Inquiry and Investigation ('Preliminary Report'). Defendant Custer, the Rush County Juvenile Probation Officer, claims she did not conduct the preliminary inquiry and investigation, but she did write up and sign the Preliminary Report on February 27, 2007. The Preliminary Report

concluded that Michael had violated Ind. Code 14-22-6-9. See Exhibit 'A.'

29. In the Preliminary Report, Defendant Custer provided a "recommended court disposition." Custer recommended: "Formal probation, no possession of a firearm or dangerous or deadly weapon until the age of 18 unless under direct supervision of child's father."

30. In the Preliminary Report, under the section "Reason for Recommendation," Custer wrote that Michael was willing to admit to having a loaded firearm in the truck, but would not admit to shooting from a public highway. Custer also wrote that according to Conservation Officer Gary Catron – who was not present for the events on the night of December 23, 2006 – shooting from a public highway was the proper offense.

31. Plaintiff believes that, based on information from Rush County Chief Probation Officer Mark Fields, that Defendant Custer did not originally intend to recommend that charges be filed against Michael. Defendant Custer originally recommended informal adjudication, but decided to file the recommendation when Michael would not admit to firing from the road.

32. On February 28, 2007, Defendant Barada filed a "Verified Petition of Delinquency" ('Petition') in the Rush Juvenile Court. In the Petition, Barada swore under penalty of perjury that "[o]n or about the 23rd day of December, 2006, Rush County, Indiana,

MICHAEL TULLY did hunt, shoot, shoot at, or kill an animal; or shoot at an object; from within, into, upon, or across a public highway in Indiana, all of which is against the peace and dignity of the State of Indiana and contrary to the form of the statute in such case made and provided to-wit: I.C. 14-22-6-9 and would constitute a Class 'C' Misdemeanor if committed by an adult." See Exhibit 'B.'

33. The filed date of the Petition was crossed out without explanation.

34. Barada was not present for and did not observe the events of December 23, 2006.

35. Barada included the Preliminary Report when he filed the Petition in the Rush County Juvenile Court, but it was not incorporated in the Petition.

36. Not until March 1, 2007, did Jim Myers, Chief Investigator for the Rush County Prosecutor, conduct an interview with Wayne Elwell. In the interview, Elwell did not state that he saw Michael fire a weapon from the road. See Exhibit 'C.'

37. On March 5, 2007, Judge Brian D. Hill, Judge of Rush Juvenile Court, issued an "Order Approving Filing of Delinquency Petition" filed by Barada.

38. On March 6, 2007, Michael and his parents were summoned to appear for a hearing on the Petition in the Rush Juvenile Court.

39. The Rush County Juvenile Court held a Fact-Finding Hearing on the charges against Michael on April 26, 2006, which was continued and completed on May 17, 2007.

40. At the hearing, Elwell testified but never stated that he saw Michael or anyone fire a weapon from the truck on the road.

41. At the close of the hearing, Judge Hill improbably found that the State had proved beyond a reasonable doubt that Michael had violated Ind. Code 14-22-6-9, and was thus a delinquent child. Judge Hill set the matter for a Dispositional Hearing.

42. On May 31, 2007, the Rush Juvenile Court held the Dispositional Hearing. Judge Hill ordered that Michael be placed on probation for six months, that he have a 10:00 p.m. curfew, and that he pay $160.00 in administrative and probation fees. Judge Hill also ordered that Michael's parents pay court costs in the amount of $157.00.

43. Also on May 31, 2007, Defendant Barada dismissed the charges against Brock Carfield, citing a lack of "trial quality evidence." See Exhibit 'D.'

44. The evidence against Brock Carfield alleged to fall short of "trial quality" was the exact same evidence that Defendant Barada contended proved beyond a reasonable doubt that Michael had fired a weapon from a roadway.

45. Michael appealed his adjudication to the Indiana Court of Appeals.

46. The Court of Appeals reversed, finding that there was insufficient evidence to support Michael's delinquency adjudication. See Exhibit 'E.'

47. The Court of Appeals found that the only evidence supporting Michael's adjudication was Elwell's testimony, which the Court of Appeals stated "amounts only to a scintilla of evidence that someone *might* have fired a gun from within or across the road. It is not substantial and probative evidence of [Michael's] guilt." (Emphasis in original) The Court of Appeals noted that the shots could have been fired by Michael or Brock, and that the shots could have been fired from the side of the road or from within or across the road.

48. On or around Monday, August 27, 2007, former Rush County Commissioner Lowell Angle fired a handgun at a neighbor's dog while he was riding his bicycle on a public road. The dog's owner reported the incident to the Sheriff's Department. Defendant Barada conducted his own investigation of the incident. Defendant Barada declined to file any charges against Angle, even though Angle admitted that he fired a weapon from a public road.

49. When Barada filed the Petition, the evidence suggesting Michael was guilty of shooting from a highway was so lacking in indicia of probable cause that it was unreasonable for Barada to believe probable cause existed.

50. Defendant Barada's conduct in attesting to facts about which he had no knowledge and lacked

probable cause to believe were true, coupled with his decision not to pursue charges against Brock Carfield due to lack of "trial worthy evidence" – even though this was the very evidence Defendant Barada contended proved beyond a reasonable doubt that Michael fired a weapon from a roadway – and his refusal to file charges against Lowell Angle – who admitted to firing a weapon from a roadway – demonstrate a pattern of bad faith, malice, ill will, or reckless disregard for Michael's constitutional rights.

51. When Custer signed the Preliminary Report, the evidence suggesting Michael was guilty of shooting from a highway was so lacking in indicia of probable cause that it was unreasonable for Custer to believe probable cause existed.

52. As a direct and proximate result of Defendant Barada's sworn statement in the Petition and Defendant Custer's allegations in the Preliminary report, Michael was charged, wrongfully adjudicated a delinquent, and wrongfully placed on probation.

53. As a direct and proximate result of Defendants' actions, Michael suffered emotional distress, mental anguish, embarrassment, humiliation, loss of his liberty while on probation, and damages.

54. As a direct and proximate result of Defendants' actions, Michael was forced to pay attorney's fees for his defense in the delinquency adjudication and appeal.

V. CAUSE OF ACTION

Malicious Prosecution – § 1983

55. Plaintiff re-alleges all of the facts and allegations set forth in paragraphs 1 through 54 as if fully set forth herein.

56. By attesting to the facts alleged in the Petition and swearing to their truth under penalty of perjury, Barada was acting as a complaining witness.

57. By affirming under penalty of perjury the allegations in the Petition while lacking probable cause to believe the allegations were true, Barada acted intentionally, maliciously, recklessly, and in bad faith.

58. By alleging in the Preliminary report that Michael had fired a weapon from a highway, Custer was acting as a complaining witness.

59. By so alleging while lacking probable cause to believe the allegation was true, Custer acted intentionally, maliciously, recklessly, and in bad faith.

60. As a direct and proximate result of Defendants' actions, Michael was maliciously prosecuted, falsely adjudicated a delinquent child, and placed on probation, therefore depriving him of rights, privileges, and immunities guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution.

61. WHEREFORE, Plaintiff respectfully requests the following relief:

a. To assume jurisdiction over this cause of action;

b. To award actual damages to Plaintiff to adequately compensate him for his injuries;

c. To award punitive damages so as to deter Defendants and others in similar situations from like conduct;

d. To grant Plaintiff costs of this action, reasonable attorney's fess [sic], with interests, and all other relief which is just and proper; and

e. To declare the conduct and practices of the Defendants unlawful.

VI. RESERVATION OF RIGHTS

Pursuant to the rules of pleading and practice, Plaintiff reserves the right to assert additional violations of state and federal law.

Respectfully submitted,

Michael K. Sutherlin
Atty. No. 508-49
Attorney for Plaintiff